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On June 26, 2015, the Supreme Court announced its much-anticipated decision in Obergefell v. Hodges, *opening the door to nationwide recognition of marriage rights for same-sex couples. The public response to the Court's decision was immediate and overwhelmingly positive. There is certainly much to celebrate about the* Obergefell *decision, but there is also cause for serious concern—even alarm. Although the* Obergefell *decision is a victory for same-sex couples that wish to marry, it is likely to have negative repercussions for those—gay or straight—who, by choice or by circumstance, live their lives outside of marriage.*

Obergefell *builds the case for equal access to marriage on the premise that marriage is the most profound, dignified, and fundamental institution that individuals may enter. By comparison, alternatives to marriage, which I collectively term "nonmarriage," are less profound, less dignified, and less valuable. On this account, the rationale for marriage equality rests—perhaps ironically—on the fundamental inequality of other relationships and kinship forms.*

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> *Some may dismiss* Obergefell*'s veneration of marriage as nothing more than rhetorical flourish. But the decision has concrete implications for life outside of marriage. Over the last fifty years, in a series of cases that I term the "jurisprudence of nonmarriage," the Supreme Court has offered tentative constitutional protections for nonmarriage and nonmarital families. By further entrenching marriage's priority,* Obergefell*'s pro-marriage impulse not only demeans and challenges the status of nonmarriage, it undermines the values and principles that underlie the jurisprudence of nonmarriage. Thus, even as* Obergefell *expands the right to marry, it may also diminish constitutional protection for life outside of marriage.*

INTRODUCTION

On June 26, 2015, the Supreme Court announced its much-anticipated decision in *Obergefell v. Hodges*,[1] a suite of cases challenging state laws prohibiting legal recognition of same-sex marriage.[2] As many predicted, the Court's decision invalidated the challenged state laws, opening the door to nationwide recognition of marriage rights for same-sex couples.[3] Finding that the challenged laws simultaneously "burden[ed] the liberty of same-sex

1. 135 S. Ct. 2584 (2015).
2. *Id.* at 2593.
3. *Id.* at 2608.

couples" and "abridge[d] central precepts of equality,"[4] a narrow majority of five justices of the Court concluded that "same-sex couples may exercise the right to marry."[5]

The public response to the Court's decision was immediate and overwhelming. Although many conservatives expressed concern about creeping "judicial activism,"[6] the articulation of "new rights,"[7] and the decision's impact on religious liberty,[8] the LGBT community and its allies were swept up in a euphoric wave of celebrations.[9] Social media trumpeted this seminal gay-rights victory.[10] Public figures expressed support for the decision and for the many couples across the country that would now be eligible for civil marriage.[11] Rainbow paraphernalia—a symbol of gay pride—dotted the national landscape as LGBT-rights supporters took to the streets to celebrate this historic victory.[12] By evening, the White House was bathed in rainbow-colored lights.[13]

There is certainly much to celebrate about the *Obergefell* decision and its expansion of civil marriage to include same-sex couples. But there is also cause for serious concern—even alarm. To be clear, the concerns that I articulate in this Essay do not align with the concerns raised by conservatives and marriage traditionalists. Instead, my critique proceeds from a progressive posture—one concerned with advancing a project of family and relationship pluralism that

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4. *Id.* at 2604.

5. *Id.* at 2599.

6. *See, e.g.*, *Those "Activist" Judges*, ECONOMIST: DEMOCRACY IN AM. (July 8, 2015, 7:34), http://www.economist.com/blogs/democracyinamerica/2015/07/judicial-politics-0 [https://perma.cc/7EL4-AFSW].

7. *See, e.g.*, Carrie Severino, Obergefell v. Hodges*: Lots of Noise; Not Much Law*, NAT'L REV: BENCH MEMOS (June 26, 2015, 4:37 PM), http://www.nationalreview.com/bench-memos/420403/obergefell-v-hodges-lots-noise-not-much-law-carrie-severino [http://perma.cc/RG39-54V5].

8. *See, e.g.*, Rachel Zoll & Steve Peoples, *Religious Liberty Is Rallying Cry After Gay Marriage Ruling*, AP: BIG STORY (June 29, 2015), http://bigstory.ap.org/article/a050a5a384564f858bb7ba8ec2674149/religious-liberty-rallying-cry-after-gay-marriage-ruling [https://perma.cc/SA9H-A84P].

9. Jennifer Calfas, Tyler Pager, & Erin A. Raftery, *Hundreds Celebrate Landmark Same-Sex Marriage Decision Outside Supreme Court*, USA TODAY (June 26, 2015), http://www.usatoday.com/story/news/nation/2015/06/26/same-sex-marriage-decision-supreme-court-celebrate/29336023 [http://perma.cc/KT5H-ML9Y].

10. J. Nathan Matias, *Were All Those Rainbow Profile Photos Another Facebook Study?*, ATLANTIC (June 28, 2015), http://www.theatlantic.com/technology/archive/2015/06/were-all-those-rainbow-profile-photos-another-facebook-experiment/397088 [http://perma.cc/YB4K-2G4V].

11. *See* Louis Michael Seidman, *The Triumph of Gay Marriage and the Failure of Constitutional Law*, 2015 SUP. CT. REV. 115 (noting that "there was actual dancing, in the streets among many other places, when the Court announced its decision in *Obergefell v. Hodges*").

12. Samantha Cowan, *Rainbows Light Up Landmarks Across the U.S. to Celebrate Marriage Equality*, TAKEPART (June 27, 2015), http://www.takepart.com/article/2015/06/27/rainbows-landmarks-marriage-equality [http://perma.cc/TZ6P-LBXC].

13. Adam B. Lerner, *White House Set Aglow with Rainbow Pride*, POLITICO (June 26, 2015), http://www.politico.com/story/2015/06/white-house-set-aglow-with-rainbow-pride-119490.html [http://perma.cc/C7PY-4Y2A].

respects and values a broader array of relationship and family forms than civil marriage alone. Although the *Obergefell* decision is a victory for same-sex couples that wish to marry, it is likely to have negative repercussions for those—gay or straight—who, by choice or by circumstance, live their lives outside of marriage.

The problem with *Obergefell* is not the outcome; anyone who values equality would rightly celebrate a decision that equalizes—at least in a formal sense—access to civil marriage. Rather, the trouble is the rhetoric and rationale that the decision uses to undergird the constitutional imperative for marriage equality. *Obergefell* builds the case for equal access to marriage on the premise that marriage is the most profound, dignified, and fundamental institution into which individuals may enter. Alternatives to marriage, which I collectively term "nonmarriage," are by comparison undignified, less profound, and less valuable. On this account, the rationale for marriage equality rests—perhaps ironically—on the fundamental *inequality* of other relationships and kinship forms.

Some may dismiss the decision's hyperveneration of marriage as nothing more than rhetorical flourish—mere words that, in the greater scheme of things, are irrelevant. But this misses the point. Rhetorical choices can have doctrinal implications. Here, *Obergefell*'s rhetoric further entrenches marriage's cultural priority, and indeed, makes it a matter of constitutional law. More importantly, *Obergefell*'s pro-marriage message has constitutional consequences that go beyond the expansion of civil marriage.

Obergefell's hyperveneration of marriage is arguably in tension with a series of Supreme Court cases that, over the last fifty years, have offered tentative constitutional protections for nonmarriage and nonmarital families. To be sure, these cases have focused on a range of issues—the rights of nonmarital children and unmarried fathers, access to contraception, and most recently, the criminalization of same-sex sodomy. Despite the differences in subject matter, these cases together suggest the promise of constitutional protection for nonmarriage, the unmarried, and nonmarital families, and therefore constitute a coherent jurisprudence. *Obergefell*'s pro-marriage impulse, by contrast, demeans and challenges the status of nonmarriage. More troublingly, it calls into question the promise of constitutional protection for nonmarriage that these cases offered.

This Essay proceeds in four parts. Part I briefly rehearses the Court's decision in *Obergefell v. Hodges*. As it explains, the *Obergefell* decision venerates marriage as the most "profound" relationship into which humans can enter.[14] In praising marriage so lavishly, the decision, by implication, casts life outside of marriage as second-rate and less worthy.

14. Obergefell v. Hodges, 135 S. Ct. 2584, 2608 (2015) ("No union is more profound than marriage.").

As Part II maintains, *Obergefell*'s disdain for nonmarriage is, in some respects, surprising—especially in view of earlier Court decisions concerning life outside of marriage. These earlier decisions concerned illegitimacy, unmarried persons' use of contraception, and criminal prohibitions on same-sex sodomy. Despite their disparate subject matter, these cases all asserted some measure of constitutional protection for life outside of marriage and nonmarital families. In so doing, these cases formed the core of what I call "the jurisprudence of nonmarriage." Part II details the jurisprudence of nonmarriage, which emerged contemporaneously with the Court's jurisprudence on the right to marry, and was most recently referenced in the Court's 2003 decision in *Lawrence v. Texas*.[15] As this Section explains, *Lawrence* can be understood as opening two distinct paths for constitutional protection for sex and sexual relationships. On one hand, the decision might be read radically as a catalyst for greater constitutional protection for nonmarriage. On this interpretation, *Lawrence* need not serve only as a way station on the road to same-sex marriage but as the impetus for a more pluralistic regime of relationship recognition in which marriage exists alongside a range of nonmarital alternatives. On the other hand, the decision might be read to gesture toward expanding civil marriage to include same-sex couples. On this interpretation, any protections for nonmarriage that *Lawrence* might offer are merely placeholder protections until gay men and lesbians become eligible for the constitutionally protected status of marriage.

As we know, *Lawrence* has been used to lay a foundation for the eventual recognition of same-sex marriage. In doing so, some have argued that *Lawrence* surrendered its potential to secure more robust constitutional protections for life outside of marriage. Part III attempts to render intelligible *Lawrence*'s conscription into the project of marriage equality. As it explains, the jurisprudence of nonmarriage, and its promise of constitutional protection for nonmarriage, has always existed uneasily with our cultural and constitutional commitments to marriage and the right to marry. Even as they recognize and protect nonmarriage, the cases that comprise the jurisprudence of nonmarriage evince a tension between protecting nonmarriage and favoring marriage as the normative ideal for intimate life. This helps to explain both how *Lawrence* came to serve as a jurisprudential underpinning for same-sex marriage and *Obergefell*'s disdain for life outside of marriage.

With this in mind, Part IV returns to *Obergefell*. As it explains, *Obergefell*, with its pro-marriage rhetoric, preempts the possibility of relationship and family pluralism in favor of a constitutional landscape in which marriage exists alone as the constitutionally protected option for family and relationship formation. In this regard, *Obergefell* does far more than venerate marriage for the purpose of democratizing access to that institution.

15. 539 U.S. 558 (2003).

Instead, it forecloses on the promise of greater constitutional protection for nonmarriage that *Lawrence* and its ilk offered. In so doing, *Obergefell* leaves nonmarriage and its constituents in a constitutionally precarious position. To illustrate this precarious posture, I consider *Obergefell*'s likely impact on a series of scenarios involving nonmarriage and nonmarital relationships. The Essay then briefly concludes.

I.
VENERATING MARRIAGE: THE *OBERGEFELL* DECISION

From start to finish, the majority opinion in *Obergefell* reads like a love letter to marriage. Writing for the majority, Justice Kennedy introduces the decision with a brief recitation of marriage's history as a cultural and legal institution.[16] On this telling, "the annals of human history" are replete with evidence of "the transcendent importance of marriage," and its "centrality . . . to the human condition."[17] Marriage is not simply a religious or civic institution. Its importance is deeply personal and meaningful to individuals. "Its dynamic allows two people to find a life that could not be found alone."[18] Indeed, the life that marriage offers is one in which the couple "becomes greater than just the two persons."[19] In short, marriage "is essential to our most profound hopes and aspirations."[20]

Marriage's profundity helps explain, in Justice Kennedy's view, the cases before the Court. The petitioners—fourteen same-sex couples and two men whose same-sex partners were deceased—challenged the opposite-sex-only marriage laws in their home states because marriage was "their only *real* path"[21] to the kind of "profound commitment"[22] they sought with their partners. Importantly, in challenging restrictive marriage laws, the petitioners were not trying to alter or "demean the revered idea and reality of marriage,"[23] as their opponents claimed. To the contrary, their claims were founded on their deep appreciation and respect for "the enduring importance of marriage"[24] and their desire to secure "its privileges and responsibilities"[25] for themselves.

Unsurprisingly, marriage's importance to the human condition is reflected in the substance of constitutional law. The right to marry, the majority observes, long had been regarded as a fundamental human right entitled to

16. *Obergefell*, 135 S. Ct. at 2593–94.
17. *Id.*
18. *Id.* at 2594.
19. *Id.*
20. *Id.*
21. *Id.* (emphasis added).
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*

robust constitutional protection.[26] After all, marriage, and indeed, the decision whether and whom to marry, is "among life's momentous acts of self-definition"[27]—a decision that may "shape an individual's destiny."[28] In this regard, the right to marry is fundamental because it is a conduit to a "two-person union unlike any other in its importance to the committed individuals."[29] Marriage offers the opportunity to forge an "enduring bond" with another person and, in so doing, cultivates the conditions under which "two persons together can find other freedoms, such as expression, intimacy, and spirituality."[30] More practically, marriage "responds to the universal fear that a lonely person might call out only to find no one there. It offers the hope of companionship and understanding and assurance that while both still live there will be someone to care for the other."[31]

Having made the case for marriage—and after explaining why marriage is not only an important social and cultural institution, but also a fundamental right under the federal Constitution—the majority concludes that the right to marry "appl[ies] with equal force to same-sex couples."[32] To underscore this exalted vision of marriage that underwrites the majority's analysis, the opinion's final paragraph offers one final meditation on marriage and its place in society and in the lives of the petitioners:

> No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were. . . . It would misunderstand [the petitioners] to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right.[33]

One cannot help but appreciate the degree to which *Obergefell* idealizes marriage. Marriage is not only the most "profound" union; it shapes destinies, provides fulfillment and care, and prevents loneliness. Marriage's benefits are not reserved for adults. As the majority notes at length, marriage serves "children's best interests."[34] If this rose-colored vision of marriage is at odds with the experiences of those who are divorced, in marriage counseling, or in

26. *Id.* at 2598.
27. *Id.* at 2599.
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.* at 2600.
32. *Id.* at 2599.
33. *Id.* at 2608.
34. *Id.* at 2600.

abusive marriages or families, Justice Kennedy and the majority stubbornly refuse to admit the disjunction.

The majority's refusal to confront these truths about marriage may stem from the fact that these disjunctions do not comport with its understanding of marriage as an institution that "always has promised nobility and dignity to all persons."[35] Dignity figures prominently in *Obergefell*. At oral argument, Justice Kennedy himself "invoked the term 'dignity' five times," and both Solicitor General Donald Verrilli and Mary Bonauto, counsel for the petitioners, emphasized that exclusion from marriage undermined the dignity of same-sex couples.[36] And, meaningfully, dignity undergirds many of Justice Kennedy's opinions on issues like abortion, sexual liberty, and LGBT civil rights[37]—issues that, like marriage, go to the heart of "intimate choices that define personal identity and beliefs."[38] Indeed, in *United States v. Windsor*—decided only two terms before *Obergefell*—Justice Kennedy invoked dignity repeatedly to strike down section 3 of the Defense of Marriage Act (DOMA), which defined marriage as a heterosexual union for purposes of federal law.[39] In *Windsor*, the majority concluded that DOMA's refusal to recognize a relationship "deemed by the State worthy of *dignity* in the community,"[40] impermissibly "interfere[d] with the equal *dignity*" of same-sex couples and their unions.[41]

In *Obergefell*, the majority goes beyond *Windsor* in its claims on the notion of dignity. In *Windsor* and earlier cases in which the Court invoked the term, dignity referred to the individual's bearing. Indeed, in *Windsor*, the majority concluded that DOMA's refusal to recognize same-sex marriages compromised the dignity of the couples and their relationships. In *Obergefell*, the issue is not simply the dignity of individual same-sex couples and their relationships. Instead, as the majority makes clear, marriage itself possesses

35. *Id.* at 2594.

36. Jeffrey Rosen, *The Dangers of a Constitutional "Right to Dignity,"* ATLANTIC (Apr. 29, 2015), http://www.theatlantic.com/politics/archive/2015/04/the-dangerous-doctrine-of-dignity/391796 [http://perma.cc/D93J-X8CS].

37. *See* United States v. Windsor, 133 S. Ct. 2675, 2692 (2013) ("[T]he State's decision to give this class of persons the right to marry conferred upon them a dignity and status of immense import."); Gonzales v. Carhart, 550 U.S. 124, 157, 168 (2007) (holding that the Partial-Birth Abortion Ban Act of 2003 was not, on its face, unconstitutional because it "express[ed] respect for the dignity of human life"); Lawrence v. Texas, 539 U.S. 558, 567 (2003) ("[A]dults may choose to enter upon [homosexual relationships] in the confines of their homes and their own private lives and still retain their dignity as free persons."); Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 851 (1992) ("[P]ersonal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education . . . [are] central to personal dignity and autonomy."); Ohio v. Akron Ctr. for Reprod. Health, 497 U.S. 502, 520 (1990) (holding that an Ohio parental notification of abortion statute did not create an undue burden because a woman seeking an abortion would still make a decision in a way that "embrace[s] her own destiny and personal dignity").

38. *Obergefell*, 135 S. Ct. at 2597.

39. 133 S. Ct. at 2675.

40. *Id.* at 2692 (emphasis added).

41. *Id.* at 2693 (emphasis added).

dignity—and in so doing, may confer that dignity to those who enter into the institution.

The trouble with dignity, of course, is that it is hard to define and subject to broad, elastic interpretations. In order for the term to be truly meaningful, it requires a foil. That is, we can better understand what is dignified by reference to that which is patently *undignified*. Regrettably, in *Obergefell*, the majority's quest to concretize marriage's dignity—and the dignitary consequences of excluding same-sex couples from marriage—comes at the expense of the unmarried and nonmarital relationships.

According to the majority, life outside of marriage is not only undignified, it is a dismal affair. The unmarried are excluded from the panoply of public and private benefits and responsibilities that marriage affords.[42] Their intimate lives lack the dignity, transcendence, and purpose that come with knowing that they are a part of a "two-person union unlike any other in its importance."[43] The unmarried, we must assume, do not experience companionship or love and instead are forced to endure profound loneliness.[44] Indeed, in Justice Kennedy's evocative description of "a lonely person" calling out "only to find no one there,"[45] modern readers will surely recall the popular story of London "singleton" Bridget Jones, who famously worried that she was destined to die alone, only to be "found three weeks later half-eaten by an Alsatian."[46]

The indignities of nonmarriage are not confined to loneliness and the absence of companionship. As the decision explains, nonmarriage is especially problematic when children are involved. The children of nonmarital relationships "suffer the significant material costs of being raised by unmarried parents, relegated through no fault of their own to a more difficult and uncertain family life."[47]

On this rendering, nonmarital life is inferior, stigmatized, and undesirable—so much so that Justice Kennedy cannot even imagine anyone willingly adopting it. Consider the majority's response to one of the stated justifications for retaining opposite-sex only marriage laws—that same-sex marriage "will harm marriage as an institution by leading to fewer opposite-sex marriages."[48] In rejecting the argument, Justice Kennedy and the majority suggest its utter ridiculousness: "[I]t is unrealistic to conclude that an opposite-sex couple would choose not to marry simply because same-sex couples may do so."[49] The fact that it is "unrealistic" to expect opposite-sex couples to forego marriage because it is available to same-sex couples is not simply

42. *Obergefell*, 135 S. Ct. at 2601 (enumerating the many tangible benefits of marriage).
43. *Id.* at 2599.
44. *Id.* at 2600.
45. *Id.*
46. HELEN FIELDING, BRIDGET JONES'S DIARY 18 (1998).
47. *Id.*
48. *Id.* at 2606–07.
49. *Id.* at 2607.

because "[d]ecisions about whether to marry and raise children are based on many personal, romantic, and practical considerations."[50] It is because it would be *absurd* to willingly forego the many benefits (material and otherwise) of marriage and subject oneself to the indignity and stigma of being unmarried simply because same-sex couples are able to exercise the right to marry.

In short, the majority's rhetoric suggests that the prospect of willingly being unmarried is utterly unimaginable. And it is this incredulity—and its underlying faith in the rightness and goodness of marriage—that fuels *Obergefell*. It leads Justice Kennedy and the majority to the right conclusion—that same-sex couples have the right to marry. But the price for securing the right to marry and "equal dignity" for same-sex couples is, perhaps ironically, the inequality and indignity of nonmarital life.

Obergefell's casual disdain for life outside of marriage is surprising in some respects. Over the last fifty years, nonmarriage increasingly has become part of the fabric of intimate life. Statistics report that individuals are increasingly foregoing marriage.[51] As importantly, many are electing to raise families outside of marriage.[52] These changes in family life have been mirrored in constitutional law. From the 1960s forward, the Supreme Court has considered the rights of unmarried persons and nonmarital families. As the next Section explains, these Court decisions form the core of what I term "the jurisprudence of nonmarriage."

II.
THE JURISPRUDENCE OF NONMARRIAGE

In praising marriage, the *Obergefell* decision draws principally on the canon of the constitutional jurisprudence on the right to marry—*Loving v. Virginia*,[53] *Turner v. Safley*,[54] and *Zablocki v. Redhail*.[55] Although the *Obergefell* majority speaks of marriage's deep roots in our society,[56] in fact, the Court's jurisprudence on the right to marry is of a relatively recent vintage. The Court first suggested that marriage was a constitutionally protected right in *Skinner v. Oklahoma*,[57] a challenge to an Oklahoma law mandating the sterilization of those thrice-convicted of crimes of "moral turpitude."[58] The

50. *Id.*

51. Mark Mather & Diana Lavery, *In U.S., Proportion Married at Lowest Recorded Levels*, POPULATION REFERENCE BUREAU (Sept. 2010), http://www.prb.org/Publications/Articles/2010/usmarriagedecline.aspx [https://perma.cc/6KHV-LPUD].

52. Org. for Econ. Co-operation & Dev., *Families Are Changing*, *in* DOING BETTER FOR FAMILIES 17, 23–24 (2011), http://www.oecd.org/els/soc/47701118.pdf [https://perma.cc/XA7C-2NK3].

53. 388 U.S. 1 (1967).

54. 482 U.S. 78 (1987).

55. 434 U.S. 374 (1978).

56. Obergefell v. Hodges, 135 S. Ct. 2584, 2593–95 (2015).

57. 316 U.S. 535 (1942).

58. *Id.* at 536.

Court invalidated the law, citing concerns about inequities in the law's scope and application.[59] However, the Court went further to note that the law also "involve[d] one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race."[60] More than two decades later, in *Loving v. Virginia*,[61] a challenge to laws prohibiting interracial marriage, the Court would rely on *Skinner* to assert that "[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."[62]

The Court would later elaborate the contours of the right to marry in *Zablocki v. Redhail*,[63] a challenge to a Wisconsin law that prohibited any "resident having minor issue not in his custody and which he is under obligation to support by any court order or judgment" from marrying without first obtaining a court order.[64] Citing *Loving*, the Court reiterated that "[m]arriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival."[65] Although states were free to impose "reasonable regulations" on the right to marry, the Wisconsin statute went too far, erecting an insurmountable barrier to marriage for those who could not "prove that their children [would] not become public charges."[66]

Six years later, in *Turner v. Safley*,[67] the Court further elaborated the content of the right to marry. *Turner* involved a constitutional challenge to a prison regulation prohibiting prisoner marriages absent "compelling reasons."[68] In striking down the regulation, the Court observed that although opportunities for physical and sexual companionship were limited, "[m]any important attributes of marriage" were available to incarcerated persons.[69] Indeed, marriage was an "expression[] of emotional support and public commitment,"[70] as well as an "exercise of religious faith [and] an expression of personal dedication."[71]

Taken together, these decisions constitute the corpus of the constitutional jurisprudence on the right to marry. Not surprisingly, the *Obergefell* Court drew heavily on this jurisprudence in rendering its decision extending the right

59. For example, the Court noted that while grand larceny and embezzlement were both considered felonies, only a third conviction for grand larceny warranted forced sterilization under the Habitual Criminal Sterilization Act. *Id.* at 538–39.

60. *Id.* at 541.

61. 388 U.S. 1 (1967).

62. *Id.* at 12.

63. 434 U.S. 374 (1978).

64. *Id.* at 375 (quoting WIS. STAT. § 245.10(1) (1973) (repealed 1978)).

65. *Id.* at 383 (quoting Loving v. Virginia, 388 U.S. 1, 12 (1967) (quoting Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942))).

66. *Id.* at 386–87.

67. 482 U.S. 78 (1987).

68. *Id.* at 81–82.

69. *Id.* at 95–96 (cataloguing marital benefits that remained, even in prison).

70. *Id.* at 95.

71. *Id.* at 96.

to marry to same-sex couples.[72] Critically, however, *Obergefell* also relied upon other decisions, including *Eisenstadt v. Baird*[73] and *Lawrence v. Texas*.[74] The Court's reliance on these decisions in extending the right to marry is less obvious than its reliance on the right-to-marry cases. After all, although *Lawrence* was written by Justice Kennedy and concerned the civil rights of LGBT persons, it did not concern the right to marry. Indeed, both *Eisenstadt* and *Lawrence* are explicitly about *nonmarriage*.

Not only are *Eisenstadt* and *Lawrence* about nonmarriage, the two decisions, in tandem with a series of cases concerning nontraditional family structures and the rights of illegitimate children and their parents, also form the corpus of a jurisprudence of nonmarriage that has developed roughly contemporaneously with the Court's jurisprudence on the right to marry. To be clear, few courts and commentators have elected to read these cases collectively as a body of jurisprudence. But as I detail in the subsequent Sections, these cases can—and should—be read in tandem to confer recognition of, and constitutional protection for, nonmarriage and nonmarital families.

A. Nonmarital Parentage Cases

In 1968, only a term after *Loving* was decided, the Court took up a set of cases involving the rights of children born outside of marriage. In *Levy v. Louisiana* and *Glona v. American Guaranty and Liability Insurance Company*, the Court took up two separate challenges to Louisiana's wrongful death law, which defined the term "survivors" to exclude illegitimate children and their parents.[75] In both cases, the Court struck down the offending provisions. Indeed, in *Levy*, the Court rejected the statute's denunciation of nonmarital children, boldly asserting that "illegitimate children are not 'nonpersons.' They are humans, live, and have their being."[76] On this account, "[l]egitimacy or illegitimacy of birth has no relation to the nature of the wrong" for which recovery in wrongful death was sought.[77] In *Glona*, the Court went further to note that "the Equal Protection Clause necessarily limits the authority of a State to draw such [distinctions between marital and nonmarital birth] as it chooses."[78] Four years later, the Court would build upon *Levy* and *Glona* to hold that, for purposes of workers' compensation benefits, the dependent

72. *See, e.g.*, Obergefell v. Hodges, 135 S. Ct. 2584, 2598–99, 2602–03 (2015) (citing these cases).

73. 405 U.S. 438 (1972).

74. 539 U.S. 558 (2003).

75. *See* Glona v. Am. Guar. & Liab. Ins. Co., 391 U.S. 73 (1968); Levy v. Louisiana, 391 U.S. 68 (1968).

76. *Levy*, 391 U.S. at 70.

77. *Id.* at 72.

78. *Glona*, 391 U.S. at 76.

illegitimate children of unmarried fathers were "on an equal footing" with their legitimate counterparts.[79]

The Court's reasoning in these early illegitimacy cases was later extended to prohibit states from limiting welfare benefits to marital families[80] and categorically denying nonmarital children the right to inherit intestate from their unmarried parents.[81] In *Gomez v. Perez*, for example, the Court recognized that nonmarital children had an enforceable right to child support from their biological parents.[82]

Further, in a series of cases involving the parental rights of unmarried fathers, the Court held that, in certain cases, unmarried fathers had parental rights that were subject to due process protection.[83] The first of these cases, *Stanley v. Illinois*,[84] explicitly centered on nonmarriage and the nonmarital family. Although they never married, for eighteen years, Joan and Peter Stanley lived together intermittently and raised three children.[85] Upon Joan's death, Peter was stripped of custody of their minor children.[86] According to Illinois law, "the children of unwed fathers [became] wards of the State upon the death of the mother."[87] Peter challenged the Illinois law on the grounds that it violated his parental rights and impermissibly distinguished between married and unmarried fathers and between unmarried fathers and unmarried mothers, in violation of the Equal Protection Clause.[88]

The Supreme Court agreed, noting that the law had not "refused to recognize those family relationships unlegitimized by a marriage ceremony."[89] Quoting *Levy* and *Glona*, the Court went on to observe that nonmarital children "cannot be denied the right of [marital] children because familial bonds in [nonmarital families] were often as warm, enduring, and important as those arising within a more formally organized family unit."[90]

While the Court did not always rule in favor of nonmarital family rights,[91] these cases dealing with nonmarital parentage established important, though

79. Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 165 (1972).

80. *See* N.J. Welfare Rights Org. v. Cahill, 411 U.S. 619 (1973).

81. *See* Trimble v. Gordon, 430 U.S. 762 (1977). *But see* Lalli v. Lalli, 439 U.S. 259 (1978) (upholding a state probate law that required nonmarital children to proffer specific proof of paternity in order to inherit intestate from their fathers).

82. 409 U.S. 535 (1973).

83. *See* Caban v. Mohammed, 441 U.S. 380 (1979); Stanley v. Illinois, 405 U.S. 645 (1972).

84. *Stanley*, 405 U.S. at 645.

85. *Id.* at 646.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* at 651.

90. *Id.* at 652.

91. *See, e.g.*, Lehr v. Robertson, 463 U.S. 248, 262 (1983) (holding that because a biological but unmarried father had failed to take advantage of the "opportunity [to develop a relationship with his child]," his due process rights were not violated by a state's failure to provide notice of pending

limited, legal rights and protections for those who lived their intimate lives outside of marriage. In so doing, these cases laid the groundwork for a burgeoning jurisprudence of nonmarriage.

B. Eisenstadt v. Baird

Critically, the illegitimacy cases were not alone in forging a jurisprudence of nonmarriage. In 1972, the same term in which *Stanley* was decided, the Court revisited the issue of state laws that prohibited access to contraception. The Court had previously confronted the constitutionality of anti-contraception laws in 1965's *Griswold v. Connecticut*.[92] There, the Court famously invalidated a Connecticut statute that prohibited married couples' use of contraceptives on the ground that the challenged law offended the right of privacy "created by several fundamental constitutional guarantees."[93] Importantly, however, the *Griswold* Court tethered the newly articulated right of privacy to marriage and the expectation of marital privacy.[94]

By 1972, when the Court took up the question of anti-contraception laws once again in *Eisenstadt v. Baird*,[95] the issue was no longer the sexual rights of married couples, but rather the sexual rights of the unmarried. In *Eisenstadt*, unlike *Griswold*, the Court decided the issue on equal protection grounds, concluding that the challenged Massachusetts criminal law impermissibly distinguished between married and unmarried persons.[96] In so doing, the *Eisenstadt* Court insisted that the marital couple enshrined in *Griswold* was "not an independent entity with a mind and heart of its own, but an association of two individuals."[97] Thus, while *Griswold* had associated the right to privacy with marriage and the marital couple, *Eisenstadt* recharacterized it as "the right of the individual, married or single, to be free from unwarranted governmental intrusion" in his or her intimate life.[98]

In focusing on the individual, whether "married or single," *Eisenstadt* decoupled the right to privacy from marriage and, as importantly, decoupled sex and marriage. Although the challenged Massachusetts statute pertained specifically to contraception, it was understood to be a means of expressing disapproval of sex outside of marriage. By invalidating the law—on the ground that "marriage-based distinctions have no place in the sorts of intimate

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adoption proceedings); Quilloin v. Walcott, 434 U.S. 246 (1978) (upholding the constitutionality of a Georgia law that precluded an unwed father from contesting the adoption of his illegitimate child).

92. 381 U.S. 479 (1965).

93. *Id.* at 485.

94. This is apparent in the Court's discussion of the "sacred precincts of marital bedrooms" and the sanctity of the marital relationship. *Id.* at 486 ("Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred.").

95. 405 U.S. 438, 440–42 (1972).

96. *Id.* at 453.

97. *Id.*

98. *Id.*

decisions exemplified by sex and reproductive choices"[99]—*Eisenstadt* implicitly recognized the prospect of intimate life outside of marriage. As importantly, it suggested that the Constitution protected this kind of sexual decision-making outside of marriage.

C. Nontraditional Families and Households

Although *Eisenstadt* and the cases involving nonmarital parentage reflected a sea change in law's approach to nonmarriage, their understanding of nonmarital life remained stubbornly fixed on conjugality and sexual relationships. In two subsequent cases, *United States Department of Agriculture v. Moreno*[100] and *Moore v. City of East Cleveland*,[101] the Court offered a more expansive vision of nonmarital relationships—one that transcended the familial bonds forged in the context of adult sexual relationships to focus instead on the bonds that arise in the context of nonmarital caregiving. *Moreno* involved a challenge to an amendment to the Food Stamp Act, which defined the term "household" to include only groups of people related by blood or affinity. As a result of the amendment's enforcement, households containing any individual who was unrelated to the other members of the household were excluded from participation in the food stamp program.[102] Among those excluded were several indigent persons who had formed households together in order to provide care to one another and stretch their limited resources. As they contended, the amended definition violated principles of equal protection and due process. As an initial matter, the challenged amendment was arbitrary and capricious in that it discounted need and food insecurity and instead chose to define household eligibility according to traditional markers of consanguinity and affinity.[103] In so doing, they further argued, the amendment impermissibly required them to forego their rights to privacy and associational freedom in order to maintain their eligibility for benefits.[104]

Although the Department of Agriculture (Department) maintained that the amendment "furthered legitimate governmental interests in efficient administration and elimination of abuses,"[105] the amendment's legislative history suggested otherwise. Specifically, the legislative history recounted

99. Susan Frelich Appleton, *The Forgotten Family Law of* Eisenstadt v. Baird, 28 YALE J.L. & FEMINISM 1, 19 (2016).

100. 413 U.S. 528 (1973).

101. 431 U.S. 494 (1977).

102. 413 U.S. at 529.

103. Brief for Appellees, U.S. Dep't of Agric. v. Moreno, 413 U.S. 528 (1973) (No. 72-534), 1973 WL 172026, at *17 ("The appellees . . . are precisely the persons sought to be aided by the Food Stamp Program, and yet they are arbitrarily excluded from food relief because, out of brutal necessity, they reside with persons unrelated to them. Clearly the unrelated household provision of the Act is totally unrelated to the accomplishment of any of the Food Stamp Program's purposes.").

104. *Id.* at *36.

105. Brief for Appellants, *Moreno*, 413 U.S. 528 (No. 72-534), 1973 WL 173826, at *7.

concerns that defining the term "household" broadly would allow hippie communes—with their disdain for traditional sexual mores and capitalism—to take advantage of federal benefits that might be directed toward the truly indigent.[106] But hippie communes were likely only part of the story behind the Department's effort to defend traditional households. As Professor Nancy Polikoff observes, "in 1971 hippies were not the only challenge to the traditional family. Feminism and the gay liberation movement were right in there . . . . [I]t was a time when defying both conventional sexual morality and the nuclear family norm were part of the vision for creating a better society."[107] With this history in mind, the Department's decision to narrowly define the term "household" likely was not only about excluding the voluntarily impoverished hippies from federal benefits, but also about excluding those whose households did not reflect the traditional family form and the traditional sexual mores with which it was associated. In striking down the challenged amendment, a majority of the Court made clear that disdain—or as the Court termed it, "animus"—for politically unpopular groups could not be a permissible predicate for lawmaking.

Like *Moreno*, *Moore v. City of East Cleveland* also involved a departure from the traditional marital family.[108] East Cleveland, Ohio, like many American suburbs, zoned its residential neighborhoods for single-family occupancy. In so doing, the city relied on a restrictive definition of the term "family." Under the city's ordinance, a "family" could include a couple, their parents, and their dependent children, but no more than one child with dependent children.[109] In effect, the ordinance excluded households composed of extended family members.

Inez Moore, an African-American grandmother, lived with her son Dale; Dale's son, Dale Jr.; and her grandson John, Dale's nephew.[110] After a city official inspected the home and determined that John was an "illegal occupant," Inez Moore was criminally convicted of "unlawfully permit[ting] two families to occupy a single family dwelling unit."[111] On appeal before the Supreme Court, she challenged her conviction on the ground that the ordinance violated her rights to freedom of association, family privacy, and equal protection of the

106. *Moreno*, 413 U.S. at 534 ("The legislative history that does exist . . . indicates that that amendment was intended to prevent so-called 'hippies' and 'hippie communes' from participating in the food stamp program.").

107. Nancy D. Polikoff, *What Married Same-Sex Couples Owe to Hippie Communes*, GUERNICA (July 15, 2010), https://www.guernicamag.com/daily/nancy_d_polikoff_what_married [https://perma.cc/76QB-5C5A].

108. 431 U.S. 494 (1977).

109. *Id.* at 496 n.2.

110. *Id.* at 496–97.

111. Brief for the Appellant, *Moore*, 431 U.S. 494 (1977) (No. 75-6289), 1976 WL 178722, at *4–5.

law.[112] The city defended the ordinance as a valid exercise of its police power for the purposes of promoting the health and welfare of its citizens.

In a fractured plurality opinion, the Court rejected the ordinance, finding that it "slic[ed] deeply into the family itself."[113] According to the *Moore* Court, "freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment."[114] Accordingly, "when the government intrudes on choices concerning family living arrangements, this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation."[115] In this case, the *Moore* plurality determined that the while the city's interests in "preventing overcrowding, minimizing traffic and parking congestion, and avoiding an undue financial burden on [the] school system . . . [were] legitimate goals, the ordinance . . . serve[d] them marginally, at best."[116] On this account, the liberty protected by the Due Process Clause did not stop at "the boundary of the nuclear family."[117] "The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition."[118] With all of this in mind, the Court concluded that "the Constitution prevents East Cleveland from standardizing its children and its adults by forcing all to live in certain narrowly defined family patterns."[119]

Taken together, the nonmarital parentage cases, *Moreno*, *Moore*, and *Eisenstadt* reflect a shift in the law's approach to nonmarriage and departures from the traditional marital family form.[120] Previously, law had insisted that marriage was the *only* site for lawful, licit sex, and the preferred conduit for family formation.[121] Read together, these cases suggest a disruption of these categorical imperatives. Although these cases did not confirm a right to sex and relationships outside of marriage, or a clear preference for alternative kinship structures, they explicitly acknowledged that departures from the marital family form occurred and that, in some circumstances, these departures would be entitled to constitutional protection. In doing so, these cases began to sketch the contours of a jurisprudence of nonmarriage that would become more fully elaborated in *Lawrence v. Texas*.[122]

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112. *Id.* at *6–7.
113. *Moore*, 431 U.S. 498.
114. *Id.* at 499.
115. *Id.*
116. *Id.* at 499–500.
117. *Id.* at 502.
118. *Id.* at 504.
119. *Id.* at 506.
120. Melissa Murray, *Strange Bedfellows: Criminal Law, Family Law, and the Legal Construction of Intimate Life*, 94 IOWA L. REV. 1253, 1300–01 (2009).
121. *Id.* at 1269.
122. 539 U.S. 558 (2003).

D. Lawrence v. Texas

Obergefell, the most recent installment in the Court's right-to-marry jurisprudence, is a striking counterpoint to the Court's most recent entry to the jurisprudence of nonmarriage, *Lawrence v. Texas*. In *Lawrence*, decided only twelve years before *Obergefell*, Justice Kennedy was far more sanguine about the issue of nonmarriage. Indeed, *Lawrence* might be understood as a capstone of the jurisprudence of nonmarriage, building upon the earlier developments glimpsed in *Eisenstadt* and the illegitimacy cases.

The facts of *Lawrence* are well known: John Geddes Lawrence and Tyron Garner were convicted under a Texas statute that criminalized same-sex sodomy.[123] They challenged their convictions, arguing that the antisodomy statute was unconstitutional.

In challenging the Texas statute, neither Lawrence nor Garner confronted the issue of marriage, same-sex or otherwise. When the Court took up the case, same-sex couples were legally barred from marrying both in Texas and in every other U.S. jurisdiction.[124] Accordingly, at issue in *Lawrence* was the question of whether same-sex sexual activity—and the nonmarital sexual relationships that LGBT couples might form—should be subject to criminal prohibition and punishment. In other words, *Lawrence* was explicitly about the right to engage in nonmarriage and nonmarital sex.

In striking down the Texas statute at issue in *Lawrence*, Justice Kennedy spoke approvingly—even reverently[125]—of nonmarital gay sex and relationships. The nonmarital sexual conduct in which Garner and Lawrence were engaged was "but one element in a personal bond that is more enduring."[126] The Texas antisodomy law at issue thus sought "to control a personal relationship that, *whether or not entitled to formal recognition in the law*, is within the liberty of persons to choose without being punished as criminals."[127] Indeed, according to Justice Kennedy, "[t]he liberty protected by the Constitution" allowed LGBT people the right to enter into such nonmarital relationships.[128]

To support this notion of constitutional protection for nonmarriage, Justice Kennedy marshaled prior Court precedents interpreting the right to privacy first articulated in *Griswold v. Connecticut*.[129] Although *Griswold* rooted the right to privacy in marriage and the marital relationship, Justice

123. *Id.* at 563.

124. Melissa Murray, *Rights and Regulation: The Evolution of Sexual Regulation*, 116 COLUM. L. REV. 573 (2016).

125. Ariela R. Dubler, *From* McLaughlin v. Florida *to* Lawrence v. Texas*: Sexual Freedom and the Road to Marriage*, 106 COLUM. L. REV. 1165, 1182 (2006) (noting that in *Lawrence*, the Supreme Court spoke of nonmarital relationships "with a tone of respect and reverence").

126. *Lawrence*, 539 U.S. at 567.

127. *Id.* (emphasis added).

128. *Id.*

129. 381 U.S. 479 (1965).

Kennedy noted that subsequent Court decisions—including *Eisenstadt v. Baird*[130]—"established that the right to make certain decisions regarding sexual conduct extends beyond the marital relationship."[131]

In making this claim, Justice Kennedy ably sidestepped an unhelpful precedent, *Bowers v. Hardwick*,[132] which seventeen years earlier upheld a similar criminal sodomy prohibition. The problem with *Bowers*, as Justice Kennedy saw it, was that the Court "misapprehended the claim of liberty there presented to it."[133] The issue was not whether the Constitution conferred a fundamental right to homosexual sex, as the *Bowers* majority asserted.[134] Indeed, to frame the issue in such bald terms would demean same-sex couples in much the same way it would "demean a married couple were it to be said marriage is simply about the right to have sexual intercourse."[135] Instead, the issue was more basic and fundamental: whether there was an individual right to engage in "the most private human conduct, sexual behavior, and in the most private of places, the home."[136] According to Justice Kennedy, the answer was clear: the Constitution protected private, consensual sexual conduct, whether it occurred in or outside of marriage.

In many ways, *Lawrence* stands as a capstone of the jurisprudence of nonmarriage. With soaring rhetoric, Justice Kennedy and the majority made clear what had only been intimated in earlier nonmarriage cases—that nonmarital relationships could be as fulfilling, and as worthy of constitutional protections, as their marital counterparts. But if *Lawrence* was expressly a case about nonmarriage, why did it figure so prominently in the Court's disposition of *Windsor* and *Obergefell*, two cases that were explicitly about marriage? The following Section takes up this question.

III.
THE TENSION BETWEEN MARRIAGE AND NONMARRIAGE

Although *Lawrence v. Texas* did not directly confront the question of same-sex marriage, its language and logic have nonetheless undergirded *United States v. Windsor* and *Obergefell v. Hodges*, the Court's most recent cases dealing with same-sex marriage rights. That *Lawrence*—a case that was explicitly about *nonmarriage*—would come to inform the disposition of two cases that explicitly concerned *marriage* is, in some sense, a puzzling incongruity. Certainly, some of *Lawrence*'s influence on *Windsor* and *Obergefell* can be explained by the facts of similar subject matter—all three

130. 405 U.S. 438 (1972).
131. *Lawrence*, 539 U.S. at 565.
132. 478 U.S. 186 (1986).
133. *Lawrence*, 539 U.S. at 567.
134. *Bowers*, 478 U.S. at 190.
135. *Lawrence*, 539 U.S. at 567.
136. *Id.*

cases concerned issues (albeit different issues) related to LGBT civil rights—and common authorship—Justice Kennedy wrote all three opinions. But there is more to *Lawrence*'s role in expanding marriage rights.

As this Section argues, *Lawrence*'s conscription into the service of same-sex marriage results from the decision's underlying ambivalence about the relative priority of marriage and nonmarriage. Critically, *Lawrence* is not alone in this ambivalence. As this Section argues, even as *Lawrence* and the other cases that comprise the jurisprudence of nonmarriage recognize and protect nonmarriage and the rights of nonmarital families, they also evince a fundamental tension between the project of recognizing and protecting nonmarriage and nonmarital families and the project of promoting and prioritizing marriage as the normative ideal of adult intimate life. The Sections that follow trace this tension in *Lawrence* and throughout the nonmarital canon. In doing so, it explains how this tension has informed the Court's most recent decision concerning same-sex marriage rights.

A. Lawrence v. Texas

Because *Lawrence* spoke movingly—even reverently—about the transcendence of nonmarital sexual relationships, it is perhaps surprising that its logic was deployed for the purpose of securing marriage equality for LGBT couples. Indeed, when *Lawrence* was first announced, some commentators saw radical potential in the decision's embrace of nonmarital sexual relationships.[137] As I have explained elsewhere, by stripping gay sex of its criminal character while reserving the question of whether gay men and lesbians were eligible for civil marriage, *Lawrence* offered the possibility of sex that was not subject to state regulation (or at least, not subject to the thick state regulation that existed under the rubrics of marriage and crime).[138] In this regard, *Lawrence*'s radical potential lay in its creation of "a space between marriage and crime that, in the relative absence of legal regulation, offered the possibility of sexual liberty untethered to the disciplinary domains of the state."[139] In articulating this interstitial space for nonmarital sex and relationships, *Lawrence* made clear that the protections of constitutional privacy were not limited to marriage, but rather, extended to nonmarriage.

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137. Dubler, *supra* note 125, at 1187 (viewing *Lawrence* "as the beginning of the extension of constitutional protection to a range of sexual practices that do not fall within monogamous marriage"); Katherine M. Franke, *The Domesticated Liberty of* Lawrence v. Texas, 104 COLUM. L. REV. 1399, 1426 (2004) (arguing that *Lawrence* offered "an uncharted territory that is worth exploring, and possibly expanding").

138. Melissa Murray, *Accommodating Nonmarriage*, 88 S. CAL. L. REV. 661, 676 (2015) ("*Lawrence* articulated a space for nonmarriage. And because this space is one that exists outside of the regulatory domains of marriage and crime, it has the potential to be a site of minimal state regulation.").

139. Melissa Murray, *Marriage as Punishment*, 112 COLUM. L. REV. 1, 54 (2012).

Professor Katherine Franke has also identified *Lawrence*'s promise for sexual liberty outside of marriage and outside of the aegis of the state.[140] By "explicitly limit[ing] the state's ability to punish nonmarital sex" under the criminal law, *Lawrence* not only "recognize[d] new rights to sexuality outside marriage,"[141] it also offered nonmarital sex and sexuality the possibility of "a unique spot of un- or under-regulation by the state."[142] To underscore this point, Franke has compared *Lawrence* to *Loving v. Virginia*, a canonical right-to-marry case:

> On June 11, 1967, the Lovings were criminals in the Commonwealth of Virginia, but on June 12, 1967 (the day the Supreme Court issued the decision in their favor), they were not. On June 11, 1967, the Lovings were not legally married in the Commonwealth of Virginia, but on June 12, 1967, they were. In this frame, when a court invalidates the criminalization of a particular behavior, the logical consequence of the court's action is to render the group subject to positive legal regulation. In this circumstance, there is no social or legal daylight between being subject to the regulation of criminal laws and being subject to the regulation of civil laws. The effect of winning the constitutional challenge . . . is that the district attorney walks the file containing your criminal case over to the clerk in the marriage license office. You and your relationship never leave the building.[143]

In stark contrast to *Loving*, which recast a once-criminal relationship as a legitimate marriage, *Lawrence* decriminalized same-sex sodomy without rendering the conduct marriage-eligible. This articulation of a space for nonmarital relationships outside of the state's traditional regulatory apparatus, in tandem with its reverence for nonmarital relationships, suggested that *Lawrence* was "compatible with efforts to dislodge marriage from its normatively superior status as compared with other forms of human attachment, commitment, and desire."[144]

But if *Lawrence* offered this radical potential to cultivate more robust protections for nonmarriage (while also challenging as discriminatory the exclusion of same-sex couples from marriage), how did it come to underwrite *Obergefell* and its embrace of marriage and disdain for nonmarital alternatives?

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140. Katherine M. Franke, *Longing for* Loving, 76 FORDHAM L. REV. 2685, 2687 (2008) (arguing that *Lawrence* creates a "unique spot of un- or under-regulation by the state").

141. *Id.* at 2686.

142. *Id.* at 2687.

143. *Id.*

144. *Id.* at 2686. To be sure, *Lawrence*'s repudiation of marriage's normative priority was not necessarily incompatible with the goal of achieving marriage equality. According to Franke, *Lawrence* presented the opportunity to "conceptualiz[e] a legal strategy that takes on the exclusivity of marriage by repudiating the homophobia that underwrites the exclusion, while not ratifying the normative priority of marriage." *Id.* at 2689. On this account, *Lawrence* could have been deployed to challenge the inequality of LGBT people's exclusion from marriage while also rejecting marriage's priority as the ideal for adult intimate life.

The majority opinion in *Lawrence* gestures toward one explanation. Indeed, although the opinion offered the radical possibility of a protected space for nonmarriage that could exist outside of thick state regulation, its language evinced discomfort with the idea of constitutional protection for nonmarriage. The decision's treatment of the two men at its heart is instructive on this point. The opinion "takes it as given that the sex between John Lawrence and Tyron Garner took place within the context of a relationship."[145] Beyond that assumption, the opinion goes further, painting Lawrence and Garner with the brush of marital domesticity.[146] Although there was scant evidence for it,[147] the opinion spoke of Lawrence and Garner's relationship as though they were long-term partners sharing a life in common.[148] The pair was not having sex simply for the sake of having sex, but in furtherance of "a personal bond that is more enduring."[149] The Court's invocation of an "enduring personal bond" was likely no coincidence. In 1965's *Griswold v. Connecticut*, the Court referenced marriage in similar terms.[150] By characterizing Lawrence and Garner's relationship in this way—despite limited evidence of any kind of relationship between the two—Justice Kennedy sought to frame the conduct at issue in *Lawrence* as marriage-like.

Thus, while the *Lawrence* opinion offered the possibility of providing a deregulated space for same-sex nonmarriage, it had difficulty dealing with nonmarriage *as* nonmarriage. Instead, it attempted to render nonmarital sex intelligible (and worthy of constitutional protection) by likening Lawrence and Garner to a married couple. In this way, the opinion's depiction of Lawrence and Garner as "like married" undermined the decision's possibilities for nonmarriage, in favor of the alternative path in which Garner and Lawrence's (fictional) "personal bond" might, in time, be legitimized through marriage.

In this regard, even as the decision focused on nonmarriage, *Lawrence* nonetheless evinced a profound tension between greater acceptance and recognition of nonmarriage and the desire to affirm marriage as the normative ideal for adult relationships. Although Lawrence and Garner remained ineligible for legal marriage, Justice Kennedy's opinion conferred

145. Franke, *supra* note 137, at 1407.

146. Murray, *supra* note 120, at 1305.

147. Indeed, Dale Carpenter has established that Garner and Lawrence were not even dating at the time of their arrests. *See* DALE CARPENTER, FLAGRANT CONDUCT: THE STORY OF *LAWRENCE V. TEXAS* 134 (2012) (referring to the two men as "casual acquaintances three weeks before" their arrest).

148. Murray, *supra* note 120, at 1305.

149. Lawrence v. Texas, 539 U.S. 558, 567 (2003).

150. According to the *Griswold* Court:

> Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

381 U.S. 479, 486 (1965); *see also* Laura A. Rosenbury & Jennifer E. Rothman, *Sex in and out of Intimacy*, 59 EMORY L.J. 809, 827 n.102 (2011) (discussing *Lawrence*'s invocation of *Griswold*).

constitutional protection on a nonmarital relationship that it characterized as *marriage-like*.

Critically, this tension between marriage and nonmarriage is not limited to *Lawrence*. As the following Sections detail, this tension is also interwoven in the fabric of the jurisprudence of nonmarriage.

B. Nonmarital Parentage Cases

The tension between marriage and nonmarriage is perhaps most evident in the nonmarital parentage cases that dotted the Court's docket during the 1960s and 1970s. Although *Levy* and *Glona* and their progeny confirmed constitutional protection for nonmarriage, this protection was deeply contingent. Even as the Court dismantled the legal impediments of nonmarital birth, it was loath to challenge the state's authority to use illegitimacy as a means of regulating nonmarital sex and sexuality, and thus focused its decisions narrowly. The opinions in *Levy* and *Glona* are illustrative. Writing for the *Levy* majority, Justice William O. Douglas flirted with the prospect of rooting the outcome in the logic of substantive due process, suggesting that "the intimate, familial relationship between a child and his own mother" implicated a "basic civil right."[151] Despite gesturing toward due process protections, Justice Douglas nonetheless was unwilling to articulate a liberty interest in nonmarital parentage—or more particularly, in nonmarital sex. Instead of focusing on the fundamental rights of the unmarried and their children, he rooted the decision in equal protection, highlighting the harms that illegitimacy classifications posed to innocent children,[152] and absence of a rational relationship between the state's illegitimacy classification and "the wrong allegedly inflicted on the mother."[153]

In contrast to *Levy*, *Glona* did not involve a claim brought on behalf of innocent children. Instead, *Glona* concerned a mother's claim for the wrongful death of a son born out of wedlock.[154] In this way, the case expressly confronted the question of whether the state could punish adults for the "sins" of fornication and nonmarital birth.[155] Tellingly, in resolving *Glona* in favor of the unmarried mother, Justice Douglas did not even hint at "basic civil rights," as he had done in *Levy*. Ignoring the question of whether the mother's privacy rights had been violated (and the underlying question of whether the right to privacy included the right to engage in sex outside of marriage), Justice Douglas again pivoted to equal protection, attacking Louisiana's incoherent

151. Levy v. Louisiana, 391 U.S. 68, 71 (1968).

152. *Id.* ("Why should the illegitimate child be denied rights merely because of his birth out of wedlock?").

153. *Id.* at 72.

154. Glona v. Am. Guarantee & Liab. Ins. Co., 391 U.S. 73, 74–75 (1968).

155. Melissa Murray, *What's So New About the New Illegitimacy?*, 20 AM. U. J. GENDER SOC. POL'Y & L. 387, 396 (2012) ("Unlike *Levy*, *Glona* squarely confronted the question of a parent's sin, rather than the more sympathetic facts of a child being punished for his parents' prior behavior.").

and inconsistent approach to illegitimacy and the regulation of out-of-wedlock births.[156] Such incoherence, Justice Douglas concluded, suggested a selective approach to the regulation of "sin"[157]—an approach that violated the Equal Protection Clause because it bore "no possible rational basis" to the state's purported interest in furthering marriage and discouraging nonmarital births.[158]

As Professor Serena Mayeri has noted, in both *Levy* and *Glona* the Court made a conscious choice to rely on equal protection—thereby focusing its analysis on the fit between the state's regulation and the ends to be achieved—rather than substantive due process and the broader question of whether there was a constitutional right to sex outside of marriage.[159] Critically, in their briefs, illegitimacy advocates pursued both doctrinal threads, offering both equal protection arguments that focused on means and ends, as well as due process arguments that focused on a right to sexual privacy, whether in marriage or not.[160] The Court's framing of *Levy* and *Glona* as equal protection cases belied the underlying tension at the heart of both cases—how to remedy the irrational legal impediments attendant to nonmarital birth without appearing to condone sex outside of marriage and nonmarital families? In the end, with its nod to equal protection, the Court offered nonmarital families some limited constitutional protection, but stopped short of protecting sex outside of marriage as a fundamental right.

The tension between marriage and nonmarriage—and the concomitant retreat to equal protection principles—was visible in other nonmarital parentage cases from this period. In these cases, as in *Levy* and *Glona*, the Court did not consider whether there was an individual right to engage in nonmarital sex and sexuality, nor did it challenge the state's authority to regulate and punish nonmarital conduct and relationships. Instead, the Court, as it had done in *Levy* and *Glona*, focused on illegitimacy classifications' harm to children and the fit between the state's use of the classification and its proffered ends. For example, in *Weber v. Aetna Casualty*,[161] decided only a few months after *Eisenstadt*, the Court studiously avoided the petitioner's privacy claims and instead focused its inquiry on the nexus between the state's proffered interest in "protecting legitimate family relationships"[162] and its use of illegitimacy as a classification. Quoting *Glona*, Justice Lewis Powell's majority opinion could identify "no possible rational basis . . . for assuming

156. *See Glona*, 391 U.S. at 74–75 (observing that the state "follow[ed] a curious course in its sanctions against illegitimacy," and cataloging the inconsistent treatment of nonmarital children and their parents throughout the state's legal regime).

157. *Id.* at 75.

158. *Id.*

159. Serena Mayeri, *Marital Supremacy and the Constitution of the Nonmarital Family*, 103 CALIF. L. REV. 1277 (2015).

160. *Id.* at 1292.

161. 406 U.S. 164 (1972).

162. *Id.* at 173 (internal quotation marks omitted).

that if the natural mother is allowed recovery for the wrongful death of her illegitimate child, the cause of illegitimacy will be served."[163]

The Court took a similar approach in *King v. Smith*,[164] a challenge to Alabama's "substitute father" regulation, which denied public assistance to the children of mothers suspected of engaging in nonmarital sexual relationships.[165] Acknowledging that the "substitute father" regulation served twin purposes—discouraging nonmarital sexuality and privatizing dependency by withholding public benefits from households where a "substitute father" was available to assume the breadwinner role.[166] The Court did not entertain the appellee's claim that the challenged regulation "invades the . . . protected privacy of the home and personal associations of mothers receiving [public assistance]."[167] Nor did it engage "the question of Alabama's general power to deal with conduct it regards as immoral and with the problem of illegitimacy."[168] Instead, the Court's concern with the "substitute father" regulation echoed the means and ends considerations that typified its prior approach to nonmarital parentage cases. Noting that Congress had determined that the statutory purpose of the Aid to Families with Dependent Children Program (AFDC) was to protect children, not punish them as a means of deterring their parents' nonmarital sexuality, the *King* Court invalidated the challenged regulation on the ground that it "plainly conflict[ed] with the [Social Security] Act."[169]

To be clear, *King* and *Weber*, like *Levy* and *Glona*, offered important protections for nonmarital families. But these protections were not exhaustive—at no point did the Court clearly articulate a fundamental right to engage in sex or a relationship outside of marriage. And more troublingly, the logic of these cases did not dispute or disrupt the prevailing view that vested states with the authority to *reasonably* regulate sex and sexuality outside of marriage. Thus, these cases provided some legal cover and protection for nonmarriage—but only to a point. The state retained its authority to "discourag[e] illicit sexual behavior and illegitimacy . . . by other means, subject to constitutional limitations,"[170] and in so doing, to prioritize marriage above nonmarriage as the paradigm for adult intimate life.

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163. *Id.* (quoting *Glona*).

164. 392 U.S. 309 (1968). Although I do not discuss *King* in Part II's discussion of the jurisprudence of nonmarriage, the case could certainly be considered part of this body of cases.

165. *Id.* at 311.

166. *See id.* at 318 ("Two state interests are asserted in support of the allocation of AFDC [Aid to Families With Dependent Children Program] assistance achieved by the regulation: first, it discourages illicit sexual relationships and illegitimate births; second, it puts families in which there is an informal 'marital' relationship on a part with those in which there is an ordinary marital relationship, because families of the latter sort are not eligible for AFDC assistance.").

167. Brief for Appellees, *King*, 392 U.S. 309 (No. 949), 1968 WL 112516, at *69–70.

168. *King*, 392 U.S. at 320.

169. *Id.* at 325–27.

170. *Id.* at 333–34.

C. Eisenstadt v. Baird

Eisenstadt, like the nonmarital parentage cases, also concerned underlying questions about the normative priority of marriage and the state's authority to regulate and punish nonmarriage and nonmarital sex. Indeed, the challenged Massachusetts law criminalizing contraceptive use and distribution was explicitly justified as a means of expressing disapproval of sex outside of marriage.[171] In *Eisenstadt*, the Court asserted some constitutional protection for life outside of marriage, but again these protections were neither full-throated nor exhaustive. As it had done in the nonmarital parentage cases, the Court rooted the *Eisenstadt* decision in equal protection, rather than substantive due process. In so doing, it focused on determining whether the state's decision to prohibit contraceptive use by unmarried persons served its stated interest in deterring premarital sex.

Critically, the Supreme Court's approach to *Eisenstadt* contrasted sharply with that of the court below. At the intermediate appellate level, the First Circuit had explicitly considered the question of substantive due process rights, concluding that the Massachusetts statute's prohibition on nonmarital contraceptive use "conflicts with *fundamental human rights*."[172] In this way, the First Circuit confronted head-on the questions of whether there was a fundamental right to use contraception (and have sex) outside of marriage.

By contrast, the *Eisenstadt* Court merely gestured toward substantive due process rights, asserting vaguely that the right to privacy was essentially "the right of the individual, married or single, to be free from unwarranted governmental intrusion" in his or her intimate life.[173] Despite the First Circuit's express invitation, the *Eisenstadt* Court stubbornly refused to "decide that important question" of whether an anti-contraception law violated fundamental individual rights under the Due Process Clause.[174] Pivoting to the logic of equal protection, as it had done in the nonmarital parentage cases, the Court instead concluded that the Massachusetts law irrationally distinguished between married and unmarried people, in violation of the Equal Protection Clause.

Critically, if the *Eisenstadt* Court had followed the First Circuit's example and rooted its decision in substantive due process, the decision would not only have invalidated anti-contraception laws, like the one at issue, but it could have been used to challenge criminal laws that prohibited cohabitation and fornication as impermissible impositions on the fundamental right to privacy. In other words, a different analytical approach would have gone further toward recognizing a fundamental right to sex outside of marriage—and securing the rights of nonmarital families. By focusing on equal protection, *Eisenstadt*'s

171. Eisenstadt v. Baird, 405 U.S. 438, 448 (1972) (explaining that "the object of the legislation is to discourage premarital sexual intercourse").

172. Baird v. Eisenstadt, 429 F.2d 1398, 1402 (1st Cir. 1970) (emphasis added).

173. *Eisenstadt*, 405 U.S. at 453.

174. *Id.*

contribution to the legal doctrine of nonmarriage was more muted and less expansive than it could have been[175]: "[W]hatever the rights of the individual to access to contraceptives may be, the rights must be the same for the unmarried and the married alike."[176]

Eisenstadt's unrealized potential is more comprehensible if we consider the fundamental tension that exists at the heart of the jurisprudence of nonmarriage. *Eisenstadt* underscores the Court's dilemma of how to protect and respect intimate life outside of marriage while also making clear that marriage was the preferred—and prioritized—form for sex and relationships. With these tensions in mind, it is entirely understandable that the *Eisenstadt* Court would reject a law that, for no reason beyond bare morality, forced unmarried persons to risk an unwanted pregnancy and the personal tumult that it entailed, while allowing their married counterparts to avail themselves of contraception. But, critically, this interest in remedying the injustices of marital status discrimination did not go so far as to permit the Court to confirm a more wide-ranging individual interest in sex outside of marriage. On this account, even as the *Eisenstadt* Court recognized the injustice of a law that targeted the unmarried, it refused to recognize a broader interest in sexual liberty outside of marriage.

D. Nonmarriage and the Nontraditional Family

As in *Eisenstadt*, the tension between marriage and nonmarriage also manifested itself in *Moreno* and *Moore*. In *Moreno*, the Court struck down an amendment to the Food Stamp Act, which defined the term "household" narrowly to include only groups of people related by blood or affinity.[177] Perhaps fearful of further expanding the range of substantive due process rights to include family forms beyond the traditional nuclear family, the Court avoided discussion of fundamental rights and instead pivoted to equal protection and a more robust form of rational basis review. Focusing its inquiry on the purposes of the Food Stamp Act and the disapproval of "so-called . . . hippy communes" that apparently animated the challenged policy shift,[178] the Court struck down the amendment on equal protection grounds and said nothing about the associational or privacy rights of unrelated householders.

175. This is not to say that *Eisenstadt* was not an important case. It surely was. As Professor Susan Frelich Appleton has observed, *Eisenstadt*, with its emphasis on the individual, rather than the couple, had the potential "to make marriage irrelevant for important decisions in intimate life." Appleton, *supra* note 99, at 23. However, as Appleton concedes, *Eisenstadt*'s promises for family law "have fallen short." *Id.* at 4.

176. *Eisenstadt*, 405 U.S. at 453.

177. *See* U.S. Dep't of Agric. v. Moreno, 413 U.S. 528 (1973).

178. *Id.* at 543.

In part because *Moreno* was decided on innovative equal protection grounds[179] and avoided discussion of fundamental rights principles, its protections for unrelated groups were not easily deployed in other circumstances. A year after *Moreno*, the Court heard *Village of Belle Terre v. Boraas*, a challenge to a local zoning ordinance that prohibited groups of more than two unrelated persons from occupying a residence within the confines of a township.[180] Unsurprisingly, the claimants, a group of unrelated college students, relied extensively on *Moreno* in their briefs before the Court. As they argued, although the *Moreno* Court reserved "the question of whether persons have a constitutionally protected interest in communal living," it nonetheless "determined that it is not a legitimate interest of government to injure persons who decide to live in this fashion."[181] Put differently, after *Moreno*, social homogeneity—as reflected in the traditional marital family—could not serve as a legitimate government interest. Or could it?

In an abrupt departure from *Moreno*, the Court upheld the Belle Terre ordinance as a valid exercise of state police power. Writing for the majority, Justice Douglas distinguished *Moreno* on the ground that the case at bar involved "economic and social legislation where legislatures have historically drawn lines which we respect against the charge of violation of the Equal Protection Clause if the law be 'reasonable, not arbitrary' and bears 'a rational relationship to a (permissible) state objective.'"[182]

The focus on equal protection was perhaps surprising. After all, in *Moreno*, Justice Douglas had penned an impassioned concurrence touting the associational rights of unrelated householders.[183] In *Belle Terre*, however, he was uncharacteristically silent about the fundamental rights of college students. Indeed, in Justice Douglas' view, the facts of *Belle Terre* did not concern *a discernible family group*, and thus "involve[d] no 'fundamental' right guaranteed by the Constitution."[184]

Three years later, *Belle Terre*'s strong defense of the state's authority to prioritize the marital family above other groupings cast a long shadow in

179. The case pioneered a more searching form of rational basis review, positing that a "bare desire to harm a politically unpopular group" could never suffice as a legitimate government interest. *Moreno*, 413 U.S. at 534; *see also* Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 760–62 (2011) (discussing heightened rational-basis scrutiny present in *Moreno*, *Cleburne v. Cleburne Living Center, Inc.*, and *Romer v. Evans*). *See generally* Gayle Lynn Pettinga, Note, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779 (1987); Raphael Holoszyc-Pimentel, *Reconciling Rational-Basis Review: When Does Rational Basis Bite?*, 90 N.Y.U. L. REV. 2070 (2015) (canvassing all cases in which the Supreme Court deployed more rigorous rational basis review); Jeremy B. Smith, Note, *The Flaws of Rational Basis with Bite: Why the Supreme Court Should Acknowledge Its Application of Heightened Scrutiny to Classifications Based on Sexual Orientation*, 73 FORDHAM L. REV. 2769 (2005).

180. Village of Belle Terre v. Boraas, 416 U.S. 1 (1974).

181. Brief for Appellees at 14, *Belle Terre*, 416 U.S. 1 (No. 73-191), 1974 WL 187429, at *14.

182. *Belle Terre*, 416 U.S. at 8 (internal citations omitted).

183. *Moreno*, 413 U.S. at 541–43 (Douglas, J., concurring) (emphasis added).

184. *Belle Terre*, 416 U.S. at 7.

Moore v. City of East Cleveland,[185] which, like *Belle Terre*, involved a city zoning ordinance that defined the family narrowly in order to deter traffic and parking congestion and school overcrowding.[186] Although a plurality of the Court invalidated the East Cleveland zoning ordinance, concluding that the Constitution's substantive due process protections were not confined to the marital family,[187] internal communications reveal the Court's anxieties about placing the extended family on the same constitutional footing as the marital family.

In a pre-argument bench memo, Dave Martin, a law clerk to Justice Lewis Powell, predicted that the Belle Terre ordinance would be affirmed, unless the Court concluded that "there is something in the Constitution that forbids the city from promoting nuclear families over extended families."[188] The "something" was, as Martin put it, "a matter of substantive due process or of 'penumbras'—involving the problematic line of cases stemming from *Griswold v. Connecticut*."[189] Although Justice Powell was inclined to strike down the challenged ordinance, he agreed with Martin that doing so on substantive due process grounds was indeed "problematic." In the margins of Martin's memo, Justice Powell noted his likely vote to reverse on the ground that "[t]he ordinance lacks a rational relationship to the objectives relied upon by the city: to prevent traffic and school congestion."[190] Instead of an expansive—but controversial—fundamental rights rationale, Justice Powell, at least initially, leaned toward the more modest equal protection approach favored in *Moreno* and in the nonmarital parentage cases.

Internal communications between the Justices show that other members of the Court were similarly wary of deciding *Moore* on due process grounds, which would entail articulating a privacy or associational right to cohabit with extended family members. In a memo to the conference, Chief Justice Burger explained, "I would not extend freedom of association to protect a purely

185. The trial court relied on *Belle Terre* in rejecting Moore's claims. *See* City of East Cleveland v. Moore, No. 33888, 1975 WL 182784, at *3 (Ohio Ct. App. July 18, 1975) ("In *Belle Terre* the Supreme Court held that the town ordinance defining a family involved no 'fundamental' right guaranteed by Constitution. That holding is equally applicable to the instant case."). Likewise, the city, in its briefs before the Supreme Court, relied extensively on *Belle Terre*. *See* Brief for the Appellee at 4, Moore v. City of East Cleveland, 431 U.S. 494 (1977) (No. 75-6289), 1976 WL 181337, at *4 ("Although the *Belle Terre* case dealt with unrelated persons, it is analogous to the present case since the question in both is the constitutional validity of an ordinance defining family.").

186. *Moore*, 431 U.S. at 499–500.

187. *Id.* at 504 ("The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition.").

188. Bench Memorandum from Dave Martin to Justice Powell 4 (Oct. 18, 1976), http://law2.wlu.edu/deptimages/powell archives/75-6289_MooreEastCleveland1.pdf [https://perma.cc/FA7A-VL99].

189. *Id.*

190. *Id.* at 1.

private relationship such as this one."[191] Nor would he accept an interpretation of the right of privacy to include a "right to cohabit with every person related by blood, marriage or adoption."[192] In Chief Justice Burger's view, principles of constitutional privacy limited constitutional protections for families to "the family unit[,] which forms the basic unit of society—parents and their offspring."[193] In other words, the marital family.

These internal exchanges reflect the Court's continuing discomfort with the central question of *Moore*, *Moreno*, and *Belle Terre* and the jurisprudence of nonmarriage more generally: Should the Constitution's fundamental rights protections extend beyond the confines of marriage and the marital family to sex outside of marriage and nonmarital relationships and kinship structures? In *Moreno*, the Court, as it did in *Eisenstadt*, offered some modest protections to unrelated householders but stopped short of rooting such protection in the freedom of association or the right to privacy. In *Belle Terre*, the Court not only refused to extend fundamental rights protection to groups of more than two unrelated persons; it validated the state's interest in maintaining "[a] quiet place where yards are wide, people few, and motor vehicles restricted,"[194] and in so doing, endorsed zoning preferences favoring the traditional marital family.

Moore, however, took a surprising turn. In an opinion authored by Justice Powell, a plurality of the Court invalidated the challenged East Cleveland ordinance on due process grounds, countering objections to expanding fundamental rights protections with appeals to history and tradition.[195] Although *Moore* was a departure from *Belle Terre* and *Moreno*, the plurality did not offer a full-throated endorsement of alternative kinship structures and their entitlement to constitutional protection. As an initial matter, although the *Moore* plurality relied on substantive due process principles and insisted that the challenged ordinance intruded upon "private realm of family life," it avoided using the language of strict scrutiny—the standard of review typically deployed in circumstances involving fundamental rights.[196] Instead, the

191. Memorandum from Chief Justice Burger to the Conference 4 (Nov. 22, 1976) (on file with The Burger Court Opinion Writing Database).

192. *Id.*

193. *Id.*

194. Village of Belle Terre v. Boraas, 416 U.S. 1, 9 (1973).

195. Moore v. City of East Cleveland, 431 U.S. 494, 504 (1977) ("Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition.").

196. Instead, the plurality observed "when the government intrudes on choices concerning family living arrangements, this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation." *Id.* at 499. Nor did the opinion do much to elaborate what would constitute an "important," much less a "compelling," state interest or how closely the state's means should serve its proffered ends. *Id.* Others agree that *Moore* deploys something less than true strict scrutiny. *See* Russell W. Galloway, Jr., *Basic Substantive Due Process Analysis*, 26 U.S.F. L. REV. 625, 642–43 & n.100 (1992) (noting that the

plurality left open the question of whether constitutional protections for the extended family were as robust as those for the marital family. Further, despite this muted fundamental rights approach, Justice Powell was unable to cobble together a clear majority, thereby limiting the decision's precedential value.

Nor did the *Moore* plurality challenge the state's interest in zoning neighborhoods to prioritize the traditional marital family form. In *Moore*, as in *Belle Terre*, the plurality accepted unquestioningly the state's authority to promote through legislation "'family needs' and 'family values.'"[197] Indeed, for the *Moore* plurality, the issue was not East Cleveland's desire to promote a particular way of family life, but rather the fact that the challenged ordinance served the city's stated interests only "marginally, at best." Thus, while the plurality invoked substantive due process principles, the underlying rationale recalled the means and ends analysis used in other cases involving nonmarital family rights.

Critically, whatever constitutional protections *Moore* afforded the extended family, the plurality's analysis did little to secure these modest protections for *all* nontraditional kinship structures. For the plurality, an "overriding factor" that distinguished *Moore* from *Belle Terre* was the fact that the East Cleveland ordinance "slic[ed] deeply *into the family itself*," whereas the Belle Terre ordinance "affected only *unrelated individuals*."[198] By prioritizing formal ties of consanguinity and affinity above other types of affiliations, the plurality ensured that the essential holding of *Belle Terre* (and *Moreno*) remained undisturbed—the full force of the Constitution's protections were unavailable to unrelated groups so long as the regulation in question was rationally related to a legitimate state purpose.[199]

And if the *Moore* plurality prioritized formal family bonds over other types of affiliations, it made clear that even this limited constitutional protection was deeply contingent. In validating the rights of extended family members, the *Moore* plurality emphasized the degree to which the extended family served and supported the marital family and its values. As Justice Powell observed in the opinion, "in times of adversity, such as the death of a spouse or economic need, the broader family has tended to come together for

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Court's scrutiny in *Moore* appears less exacting than strict scrutiny); David D. Meyer, *The Constitutionality of "Best Interests" Parentage*, 14 WM. & MARY BILL RTS. J. 857, 875 (2006) (observing that, in *Moore* and other cases, the Court "sidestepped strict scrutiny in favor of softer, or at least more ambiguous, standards of review").

197. *Moore*, 431 U.S. at 498.

198. *Id.* (emphasis added).

199. Critically, in the same year that *Moore* was decided, the Court underscored that fundamental rights protection could be denied to groups of unrelated persons. In *Smith v. Organization of Foster Families for Equality and Reform*, although the Court conceded that foster families could not be dismissed "as a mere collection of unrelated individuals," it balked at extending to them the constitutional protections afforded "the natural family." 431 U.S. 816, 844–47 (1977). For the Court, the lack of biological ties among foster families, as well as the absence of an historical tradition venerating foster care, furnished ample grounds for distinguishing *Smith* from *Moore*.

mutual sustenance and to maintain or rebuild a secure home life."[200] In this way, protection for the extended family was linked to that unit's ability to *serve and support*, rather than supplant, the traditional marital family as the preferred family form.[201]

Further, the plurality suggested that constitutional protection for the extended family was more likely when the extended family was functioning in the manner of the traditional family unit. As the plurality opinion explained, in many circumstances, including the circumstances at issue in *Moore*, extended family members often assumed the functions of the marital family and its members. "Decisions concerning child rearing, which [prior precedents] have recognized as entitled to constitutional protection, long have been shared with grandparents or other relatives who occupy the same household."[202] In such cases, extended family members did not simply advise parents on childrearing, they often assumed "major responsibility for the rearing of the children."[203] On this account, the state's treatment of Inez Moore was egregious not because she enjoyed an obvious right to cohabit with her extended family in the manner of her choosing, but because her intergenerational household had assumed the functions of the nuclear family.

Justice Thurgood Marshall, who joined Justice Powell's plurality, made the point more emphatically. In a forceful memo to Chief Justice Burger, Justice Marshall underscored that Inez Moore was no ordinary grandmother, but a grandmother who was performing "the duties of a mother for her grandchildren."[204] Likewise, Justice Brennan's concurring opinion noted that East Cleveland had prosecuted and jailed "a 63-year-old grandmother for refusing to expel from her home her now 10-year-old grandson who has lived with her and been brought up by her since his mother's death when he was less than a year old."[205] On this telling, Inez Moore was not simply a grandmother in an unorthodox intergenerational living situation; she was a de facto mother to a family unit that approximated the caregiving functions of the marital family in important ways.

Taken together, *Moreno*, *Belle Terre*, and *Moore* suggest the Court's uneven approach to nontraditional family structures and its fundamental discomfort with the prospect of expanding constitutional protections beyond the confines of marriage and the marital family. Although the Court extended some protections to alternative kinship structures in *Moreno* and *Moore*, it did so only tentatively. In the end, the constitutional protections that *Moreno* and *Moore* conferred did not reflect a broad vision of the family or a thick

200. *Moore*, 431 U.S. at 505.
201. *Id.*
202. *Id.*
203. *Id.*
204. Memorandum from Justice Marshall to Chief Justice Burger (Nov. 23, 1976) (on file with The Burger Court Opinion Writing Database).
205. *Moore*, 431 U.S. at 506 (Brennan, J., concurring).

conception of familial rights and liberties. Instead, their logic depended on a thinner vision of rights—one that emphasized the imperfect fit between the state's ends and means and the degree to which the nontraditional family served the functions of the traditional marital family.

* * * *

As this Section recounts, in the decade preceding *Obergefell*, *Lawrence v. Texas* appeared to gesture toward expanding the jurisprudence of nonmarriage to offer greater constitutional protection for nonmarital sex and relationships. But rather than building upon *Lawrence* to expand protections for nonmarriage, courts and commentators regarded the decision as a critical first step toward achieving same-sex marriage. This narrow interpretation of *Lawrence* ultimately culminated in *Obergefell* and the nationwide legalization of same-sex marriage.

Careful examination of *Lawrence* and the other cases that comprise the jurisprudence of nonmarriage renders the pursuit of marriage equality—and the promotion of marriage—over greater protections for nonmarriage more intelligible. Although the cases that comprise the jurisprudence of nonmarriage offered some modest constitutional protection for nonmarriage, they also evinced a fundamental tension between the protection of nonmarriage and the desire to promote marriage and the marital family as the normative ideal for intimate life. In *Lawrence*, this tension was manifested in the majority opinion's depiction of the two petitioners as long-term life partners in a marriage-like relationship. In *Eisenstadt*, the nontraditional family cases, and the nonmarital parentage cases, this tension can be glimpsed in the Court's narrow focus on equal protection and means and ends, as well as the Court's reluctance to decide the cases on due process fundamental rights grounds. Recognizing and probing this tension in these cases helps to explain the turn toward marriage, even as other possibilities were available.

The following Section returns to *Obergefell*. As it maintains, *Obergefell* can be understood not simply as the culmination of a pro-marriage impulse. Instead, the decision might also be read as resolving the tension between protecting nonmarriage and promoting and prioritizing marriage that has been evident in the Court's jurisprudence. In this regard, we might understand *Obergefell* not simply as an effort to nationalize marriage equality, but also as an effort to further entrench marriage's primacy and foreclose opportunities to establish and protect nonmarital alternatives.

IV.
MARRIAGE AND NONMARRIAGE AFTER *OBERGEFELL*

As the foregoing Sections maintain, even as it evinced the tension between protecting nonmarriage and promoting and prioritizing marriage, the

jurisprudence of nonmarriage offered modest protections for life outside of marriage—protections that, in time, might have been further expanded to provide a robust set of rights and entitlements for the unmarried.

The Court's decision in *Obergefell* might be understood as effectively foreclosing the possibility of greater protections for nonmarriage. In *Obergefell*, the Court promotes marriage—and only marriage—as the normative ideal for intimate life. And critically, in endorsing marriage so vigorously, the *Obergefell* decision goes beyond simply favoring marriage over potential alternatives; it gestures toward the repudiation of the jurisprudence of nonmarriage and its aspirations for nonmarital equality.

First, in unequivocally endorsing marriage over nonmarriage, *Obergefell* forecloses the possibility of further developing the jurisprudence of nonmarriage to provide more robust constitutional protections for life outside of marriage. Second, the decision cultivates the conditions under which courts and legal actors may renege on the existing constitutional protections for nonmarriage that *Lawrence* and its ilk offered, leaving those who live their lives outside of marriage in a constitutionally precarious position. The Sections that follow explore these claims. Specifically, they identify a series of scenarios involving nonmarriage and consider how the Court's decision in *Obergefell* might impact their resolution.

*A. Relationship Recognition Post-*Obergefell

Obergefell, and the legalization of same-sex marriage across the nation, leaves alternative statuses, like domestic partnerships and civil unions, in a precarious position. To be clear, while civil unions and domestic partnerships often provide many (though not all) of the benefits of civil marriage, they are specifically understood as *nonmarital* statuses.[206] That is, these statuses are a species of nonmarriage—alternatives to marriage for purposes of relationship recognition.

The role of alternative statuses as marriage alternatives is deeply embedded in their history. Alternative statuses first emerged in the form of municipal-level domestic-partnership registries in progressive cities like Berkeley, California in the 1980s.[207] In these initial iterations, alternative statuses differed markedly from the civil unions and domestic partnerships that we know today. For example, although the earliest regimes were broadly associated with efforts to secure rights for same-sex couples, they were available to *all* eligible unmarried couples, whether gay or straight.[208] Their

206. Knight v. Schwarzenegger, 26 Cal. Rptr. 3d 687 (Ct. App. 2005).

207. *See* Melissa Murray, *Paradigms Lost: How Domestic Partnership Went from Innovation to Injury*, 37 N.Y.U. REV. L. & SOC. CHANGE 291, 294 (2013).

208. NANCY D. POLIKOFF, BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW 48 (2008); Murray, *supra* note 207; Nancy D. Polikoff, *Equality and Justice for Lesbian and Gay Families and Relationships*, 61 RUTGERS L. REV. 529, 532 (2009) ("The

availability to unmarried couples underscored their function as an alternative to marriage for formalizing and recognizing relationships.

Further, even though their eligibility criteria often drew on marital norms, these early alternative statuses were not necessarily intended to be close approximations of marriage. They offered only a limited range of employee benefits,[209] underscoring that they were "first and foremost a workplace concept"[210] intended to address "inequities that occur when benefits are limited to married couples because same gender cohabitating couples cannot marry and opposite gender cohabitating couples choose not to marry."[211] In this regard, in their earliest iterations, these alternative statuses were not intended as a proxy for marriage; instead, they were consciously understood as a species of *nonmarriage*—a form of recognition available to those who were either ineligible for marriage or chose not to pursue marriage.

Eventually, these municipal-level alternatives to marriage migrated to the state level.[212] In doing so, these alternative statuses began to mimic marriage in benefits and form.[213] In states like Vermont, which pioneered the civil union status for same-sex couples in 1999,[214] alternative statuses were "marriages-in-all-but-name."[215] They offered same-sex couples most of the rights and responsibilities that state law conferred to married couples.[216]

In a handful of jurisdictions, these alternative statuses were available to *all* eligible couples, whether gay or straight. They therefore served as true alternatives to marriage for benefits and state-relationship recognition.[217] More often, however, jurisdictions limited these alternative statuses to same-sex

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early 1980s saw a push for a status called 'domestic partnership' as an alternative to marriage. It was a status available to both same-sex and different-sex couples.").

209. Murray, *supra* note 207, at 295 (noting that municipal domestic partnerships typically offered only "dental and health coverage and employee leave," and that this "was decidedly more modest than the vast panoply of municipal, state, and federal benefits to which married couples were entitled").

210. Paula L. Ettelbrick, *Wedlock Alert: A Comment on Lesbian and Gay Family Recognition*, 5 J.L. & POL'Y 107, 142 (1996).

211. Murray, *supra* note 207, at 295.

212. *Id.* at 296.

213. *Id.* at 298.

214. In 1999, the Vermont Supreme Court determined that the Common Benefits Clause of the state constitution required the state to extend the benefits and obligations of marriage to same-sex couples. Baker v. State, 744 A.2d 864 (Vt. 1999). The state legislature responded by introducing civil unions, which afforded same-sex couples all of the benefits of marriage, albeit under a different rubric. *See* John G. Culhane, *The Short, Puzzling(?) Life of the Civil Union*, 19 B.U. PUB. INT. L.J. 1, 1–2 (2009).

215. *See* Culhane, *supra* note 214, at 12 (referring to civil unions as "marriages-in-all-but-name").

216. *See, e.g.*, California Domestic Partner Rights and Responsibilities Act of 2003, §4, 2003 CAL. STAT. 3081, 3082 (codified as amended at CAL. FAM. CODE §§ 297–297.5 (West 2015)); *see also* Gregg Jones & Nancy Vogel, *Domestic Partners Law Expands Gay Rights*, L.A. TIMES, Sept. 20, 2003, at A1 (discussing the expansion of California's domestic-partnership regime).

217. *See, e.g.*, Illinois Religious Freedom Protection and Civil Union Act, 750 ILL. COMP. STAT. ANN. 75/1–75/90 (West Supp. 2012).

couples and opposite-sex couples over the age of sixty-two. These limits accomplished two important ends. First, they made clear the state's view that for most opposite-sex couples, marriage was the preferred relationship form.[218] Second, they underscored that the primary purpose of alternative statuses was to provide marriage's benefits to same-sex couples, while continuing to withhold from these couples access to marriage itself.[219] Not surprisingly, as marriage-equality challenges came before courts, these "separate but equal" statuses were widely derided as second-rate proxies to marriage—constitutional injuries that demeaned the dignity of same-sex couples.[220]

Today, in the post-*Obergefell* era, alternative statuses stand at a crossroads. If we view alternative statuses simply as an interim step on the road to same-sex marriage, then the introduction of nationwide marriage equality might suggest that they are no longer necessary. After all, why settle for a marriage-like alternative when the real thing is widely available?

But what if we regarded alternative statuses as more than a temporary stand-in for marriage? What if we viewed alternative statuses as they were initially intended: as an alternative to marriage that could provide limited rights and recognition—and limited state regulation—to those who, for whatever reason, are unmarried? From this vantage point, alternative statuses might provide a foundation for building a more pluralistic legal landscape in which marriage and a range of other options for relationship recognition might happily coexist—the kind of pluralistic legal landscape that might have emerged under a more radical interpretation of *Lawrence v. Texas*.[221] Regrettably, recent developments suggest that the prospect of a more pluralistic relationship-recognition regime will not follow in marriage equality's wake.

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218. This dynamic was at work in California's experience with domestic partnership. The original model of California's statewide domestic partnership status was intended to be available to all eligible unmarried couples. Recognizing that this would pose a challenge to marriage as the paradigm model for heterosexual relationships, Governor Gray Davis threatened to veto the legislation. In the end, the legislation was narrowed to limit the availability of the domestic partnership registry to "same-sex couples and seniors over 62 years of age." *See* Murray, *supra* note 207, at 297.

219. *Id.* at 297–98.

220. According to some courts, although domestic partnerships conveyed important benefits and obligations, they lacked marriage's cultural and social heft. *See* Perry v. Brown, 671 F.3d 1052, 1078 (9th Cir. 2012) ("Had Marilyn Monroe's film been called *How to Register a Domestic Partnership with a Millionaire*, it would not have conveyed the same meaning as did her famous movie, even though the underlying drama for same-sex couples is no different. The *name* 'marriage' signifies the unique recognition that society gives to harmonious, loyal, enduring, and intimate relationships."); Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 994 (N.D. Cal. 2010) ("[D]omestic partnerships are distinct from marriage and do not provide the same social meaning as marriage."). As relatively new and unfamiliar institutions, alternative statuses lacked marriage's "culturally superior status," and thus were a "substitute and inferior institution." *Id.*

221. *See supra* Part III.A and accompanying text.

In many states that have introduced marriage equality, alternative statuses have been jettisoned.[222] For example, when the Vermont Legislature legalized same-sex marriage,[223] it also eliminated civil unions as an option for relationship recognition.[224] Likewise, when Connecticut, Delaware, New Hampshire, and Rhode Island legalized same-sex marriages, each state's relevant legislation also required the conversion of existing civil unions into marriages.[225] After the introduction of marriage equality in Arizona, state officials advised state employees in same-sex domestic partnerships that "[b]ecause same-sex couples may now marry in Arizona, . . . same-sex domestic partners will no longer be eligible for [health insurance] coverage . . . effective January 1, 2015."[226] In December 2014, the state followed up with a more direct message: "[*i*]*f you have not married your same-sex domestic partner*, and you wish to retain family benefits for your partner and/or partner's children, you have *until December 31, 2014* to marry."[227]

Even Berkeley, California, the city that pioneered the concept of domestic partnerships in the early 1980s, was not immune to the pressure to consolidate relationship-recognition structures in marriage equality's wake. After the introduction of statewide marriage equality in 2013, city officials called for the elimination of the city's domestic partnership registry.[228] The registry, which was available to all unmarried couples, whether gay or straight, was deemed unnecessary in the face of statewide recognition of same-sex marriages.[229]

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222. *See* Kaiponanea T. Matsumura, *A Right Not to Marry*, 84 FORDHAM L. REV. 1509, 1518 (2016) ("Many jurisdictions have already phased out existing nonmarital statuses like domestic partnerships and civil unions or are moving in that direction.").

223. *See* Abby Goodnough, *Gay Rights Groups Celebrate Victories in Marriage Push*, N.Y. TIMES, Apr. 7, 2009, at A1.

224. *See* Shannon Minter & Christopher Stoll, *Legal Developments in Marriage Law for Same-Sex Couples*, GP SOLO MAG. (Jan./Feb. 2010), http://www.americanbar.org/newsletter/publications/gp_solo_magazine_home/gp_solo_magazine_index/minter_stoll.html [https://perma.cc/2L3W-KDCD] (discussing the status of Vermont civil unions).

225. *See* CONN. GEN. STAT. § 46b-38rr(a) (2015) ("Two persons who are parties to a civil union . . . shall be deemed to be married . . . and such civil union shall be merged into such marriage by operation of law."); DEL. CODE ANN. tit. 13, § 218 (2015) (providing that "no civil union licenses shall be issued, no persons shall be eligible to enter into new civil unions, and no new civil unions shall be solemnized, on or after July 1, 2013," and providing that "[p]ersons who are parties to a civil union entered into pursuant to this chapter, which civil union has not been converted to a marriage pursuant to subsection (b) of this section, shall be deemed married under Chapter 1 of this title and such civil union shall be automatically converted to a marriage by operation of law"); R.I. GEN. LAWS § 15-3.1-12(a) (2015) ("[T]wo (2) persons who are parties to a civil union . . . may apply for and be issued a marriage license . . . [and] the civil union of such persons shall be merged into the marriage by operation of law.").

226. Email from Arizona State University (ASU) Benefits Communications to ASU Employees (Nov. 6, 2014, 11:25 PDT) (on file with author).

227. Email from Staff and Faculty Group Supporting Gay, Lesbian & Bisexual Issues at ASU (UBIQUITY) to UBIQUITY (Dec. 11, 2014, 16:24 PDT) (on file with author).

228. Eli Wolfe, *Berkeley to Look at Closing Domestic Partnership Registry*, BERKELEYSIDE (Sept. 30, 2013), http://www.berkeleyside.com/2013/09/30/domestic-partnership-registry [http://perma.cc/RWQ4-US9S].

229. *Id.*

In nationalizing marriage equality, *Obergefell* may sound the death knell for alternative statuses—and the promise of a more pluralistic relationship-recognition regime.[230] As *Obergefell*'s language suggests—and Berkeley's experience attests—in a world where all couples have access to the most "profound commitment,"[231] there is no obligation to acknowledge or respect relationship statuses that are "somehow less[]"[232] than marriage.

Indeed, the constitutionalization of marriage equality may provide a firm basis for states to refuse legal recognition of alternative statuses and other nonmarital arrangements. At the time *Obergefell* was decided, the constitutions of twenty states contained provisions that went beyond simply prohibiting legal recognition of same-sex marriage to also prohibit legal recognition of alternative statuses,[233] and in the case of four states, any other kind of similar relationship.[234] The rationale behind these provisions was simple—to prohibit both the legal recognition of same-sex marriage and any alternative statuses or arrangements that might be credited with the benefits of marriage.

While *Obergefell* invalidated state laws and constitutional provisions prohibiting legal recognition of same-sex marriages, the decision does little to disrupt state statutes or constitutional provisions prohibiting legal recognition of marriage alternatives. Indeed, after *Obergefell*, the justifications for denying legal recognition to alternative statuses and other nonmarital relationships are not just constitutionally permissible, they are supported by constitutional principles.

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230. *See* Jonathan D. Evans, *Domestic Partnerships in Doubt?*, DAILY J., July 7, 2015, at 6–7.

231. Obergefell v. Hodges, 135 S. Ct. 2584, 2594 (2015).

232. *Id.* at 2600.

233. *See* ALA. CONST. AMDT. 774 (2006); ARK. CONST. AMDT. 83 (2004); FLA. CONST. ART. I, § 27 (2008); GA. CONST. ART. I, § IV (2004); ID. CONST. ART. III, § 28 (2006); KAN. CONST. ART. 15, § 16 (2005); KY. CONST. § 233A (2004); LA. CONST. ART. 12, § 15 (2004); N.C. CONST. ART. XIV, § 6 (2012); N.D. CONST. ART. XI, § 28 (2004); OHIO CONST. ART. XV, § 11 (2004); OKLA. CONST. ART. 2, § 35 (2004); S.C. CONST. ART. XVII, § 15 (2006); TEX. CONST. ART. I, § 32 (2005); UTAH CONST. ART. I, § 29 (2004); WIS. CONST. ART. XIII, § 13 (2006).

234. *See* MICH. CONST. ART. I, § 25 (2004) ("To secure and preserve the benefits of marriage for our society and for future generations of children, the union of one man and one woman in marriage shall be the only agreement recognized as marriage or similar union for any purpose."); NEB. CONST. ART. I-29 (2000) ("Only marriage between a man and a woman shall be valid or recognized in Nebraska. The uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same-sex relationship shall not be valid or recognized in Nebraska."); S.D. CONST. ART. XXI, § 9 (2006) ("Only marriage between a man and a woman shall be valid or recognized in South Dakota. The uniting of two or more persons in a civil union, domestic partnership, or other quasi-marital relationship shall not be valid or recognized in South Dakota."); VA. CONST. ART. I, § 15-A (2006) ("That only a union between one man and one woman may be a marriage valid in or recognized by this Commonwealth and its political subdivisions. This Commonwealth and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance, or effects of marriage. Nor shall this Commonwealth or its political subdivisions create or recognize another union, partnership, or other legal status to which is assigned the rights, benefits, obligations, qualities, or effects of marriage.").

A recent case, *Blumenthal v. Brewer*,[235] is instructive on this point. There, the Illinois Supreme Court considered a property dispute between an estranged couple.[236] After twenty-six years together, Jane Blumenthal and Eileen Brewer ended their relationship, and Blumenthal filed suit to partition the Chicago home they jointly owned.[237] Brewer filed a counterclaim for sole title to the property, arguing that this would equalize the couple's assets by accounting for the time she had spent at home as the primary caregiver to the couple's three children.[238] Relying on a 1979 Illinois Supreme Court decision, *Hewitt v. Hewitt*,[239] the trial court dismissed Brewer's counterclaims.[240] As the trial court explained, in *Hewitt*, the Illinois Supreme Court rejected a woman's claim to a share of the assets she and her partner had accumulated during a fifteen-year nonmarital relationship in which they lived together and raised three children.[241] According to the *Hewitt* court, allowing recovery to a woman who chose "to enter into what have heretofore been commonly referred to as 'illicit' or 'meretricious' relationships" would "encourage formation of such relationships and weaken marriage as the foundation of our family-based society."[242]

Brewer appealed, and in December 2014, an intermediate appellate court reversed the trial court's decision on the ground that "the public policy to treat unmarried partnerships as illicit no longer exists."[243] In rejecting "*Hewitt's* concern that recognizing property rights between unmarried cohabitants would somehow contravene the public policy of strengthening and preserving the institution of marriage,"[244] the intermediate appellate court cited a range of legislative developments, including the decriminalization of nonmarital cohabitation, the emergence of no-fault divorce, and the enactment of the Illinois Religious Freedom Protection and Civil Union Act, which "provides for unmarried couples to enter into Illinois civil unions and receive all the rights and burdens available to married couples."[245] According to the intermediate appellate court, these developments, taken together, made clear that "Illinois now respects and supports the relationships that *Hewitt* labeled as illicit or immoral."[246]

235. No. 118781 (*Blumenthal II*), 2016 WL 4395043 (Ill. Aug. 18, 2016).
236. Blumenthal v. Brewer (*Blumenthal I*), 24 N.E.3d 168 (Ill. App. Ct. 2014).
237. *Id.* at 169.
238. *Id.*
239. 394 N.E.2d 1204 (Ill. 1979).
240. *Blumenthal I*, 24 N.E.3d at 169.
241. *Id.*
242. *Id.* at 175; *Hewitt*, 394 N.E.2d at 1207.
243. *Blumenthal I*, 24 N.E.3d at 174.
244. *Id.*
245. *Id.* at 177, 180; *see also* Illinois Religious Freedom Protection and Civil Union Act, 750 ILL. COMP. STAT. ANN. 75/1–75/90 (2011).
246. *Blumenthal I*, 24 N.E.3d at 181.

In recognizing—and indeed extending—protections for nonmarriage and nonmarital families, the intermediate appellate court's decision in *Blumenthal* was an important counterpoint to *Obergefell*'s prioritization of marriage. Indeed, the decision framed Illinois's civil union regime, which is available to all unmarried couples, as a positive development that allowed the state to provide multiple models—beyond just marriage—for relationship recognition. The question, of course, was whether the intermediate appellate court's logic, announced seven months before the Supreme Court's decision in *Obergefell*, would survive *Obergefell*'s pro-marriage impulse.

In August 2016, when the Illinois Supreme Court announced its decision in the *Blumenthal* appeal,[247] the intermediate appellate court's ethic of nonmarital equality was notably absent. The Illinois Supreme Court rejected the intermediate appellate court's broad reading of legal change. Explaining that "the legislature knows how to alter family-related statutes and does not hesitate to do so when and if it believes public policy so requires," the court refused to credit Brewer's joint property claims on the ground that *Hewitt* remained good law in Illinois.[248]

In addition to rejecting the intermediate appellate court's narrative of legal change, the Illinois Supreme Court also noted "the current legislative and judicial trend is to uphold the institution of marriage."[249] Critically, as evidence of this "trend," the *Blumenthal* court looked to the United States Supreme Court's decision in *Obergefell*.[250] Although *Obergefell* made clear that the state could not bar same-sex couples from marriage, the Illinois Supreme Court found "nothing in [*Obergefell* that] can fairly be construed as requiring states to confer on non-married, same-sex couples common-law rights or remedies not

247. Blumenthal v. Brewer, No. 118781, 2016 WL 4395043 (Ill. Aug. 18, 2016).

248. *Id.* at *19. It is worth noting that courts in a vast majority of states, as well as the District of Columbia, have chosen to recognize claims between former domestic partners like Blumenthal and Brewer. *See, e.g.*, Bishop v. Clark, 54 P.3d 804 (Alaska 2002); Cook v. Cook, 691 P.2d 664 (Ariz. 1984); Bramlett v. Selman, 597 S.W.2d 80 (Ark. 1980); Marvin v. Marvin, 557 P.2d 106 (Cal. 1976); Boland v. Catalano, 521 A.2d 142 (Conn. 1987); Mason v. Rostad, 476 A.2d 662 (D.C. 1984); Poe v. Estate of Levy, 411 So. 2d 253 (Fla. Dist. Ct. App. 1982); Simmons v. Samulewicz, 304 P.3d 648 (Haw. Ct. App. 2013); Glasgo v. Glasgo, 410 N.E.2d 1325 (Ind. Ct. App. 1980); Donovan v. Scuderi, 443 A.2d 121 (Md. Ct. Spec. App. 1982); Wilcox v. Trautz, 693 N.E.2d 141 (Mass. 1998); Featherston v. Steinhoff, 575 N.W.2d 6 (Mich. Ct. App. 1997); In re Estate of Eriksen, 337 N.W.2d 671 (Minn. 1983); Cates v. Swain, No. 2010–CT–01939–SCT, 2013 WL 1831783 (Miss. May 2, 2013); Hudson v. DeLonjay, 732 S.W.2d 922 (Mo. Ct. App. 1987); Kinkenon v. Hue, 301 N.W.2d 77 (Neb. 1981); Hay v. Hay, 678 P.2d 672 (Nev. 1984); Dominguez v. Cruz, 617 P.2d 1322 (N.M. Ct. App. 1980); Morone v. Morone, 413 N.E.2d 1154 (N.Y. 1980); Collins v. Davis, 315 S.E.2d 759 (N.C. Ct. App. 1984), aff'd per curiam, 321 S.E.2d 892 (N.C. 1984); McKechnie v. Berg, 667 N.W.2d 628 (N.D. 2003); Beal v. Beal, 577 P.2d 507 (Or. 1978) (en banc); Knauer v. Knauer, 470 A.2d 553 (Pa. Super. Ct. 1983); Bracken v. Bracken, 217 N.W. 192 (S.D. 1927); Leek v. Powell, 884 S.W.2d 118 (Tenn. Ct. App. 1994); Belcher v. Kirkwood, 383 S.E.2d 729 (Va. 1989); In re Marriage of Lindsey, 678 P.2d 328 (Wash. 1984) (en banc); Goode v. Goode, 396 S.E.2d 430 (W. Va. 1990); Watts v. Watts, 405 N.W.2d 303 (Wis. 1987); Kinnison v. Kinnison, 627 P.2d 594 (Wy. 1981).

249. *Blumenthal II*, 2016 WL 4395043, at *20.

250. *Id.*

shared by similarly situated non-married couples of the opposite sex."[251] Indeed:

> [N]ow that the centrality of the marriage has been recognized as a fundamental right for all, it is perhaps more imperative than before that [courts] leave it to the legislative branch to determine whether and under what circumstances a change in the public policy governing the rights of parties in nonmarital relationships is necessary.[252]

More striking than the court's endorsement of the trend to "uphold the institution of marriage" was its dim view of the couple's decision to live outside of marriage for the duration of their relationship. In language that was included in the original version of the opinion, but later eliminated,[253] the *Blumenthal* majority noted that during the course of the couple's relationship, and at the time of its demise, Blumenthal and Brewer were ineligible for civil marriage in Illinois. The majority, however, had little sympathy for the couple's failure to formalize their relationship, whatever the legal impediments. As it noted in the original version of the opinion, although same-sex marriage was unavailable in Illinois, the couple was not "without options."[254] Indeed, the majority noted that, in 2005, the couple "took out a marriage license in Massachusetts" and "could have married in Massachusetts, despite the inconvenience."[255] Critically, the "inconvenience" to which the court referred was not simply the effort required to travel to Massachusetts from Illinois, but also the fact that Illinois did not recognize same-sex marriages performed in other jurisdictions. No matter. In the court's views, there were affirmative steps that Blumenthal and Brewer could have taken to formalize their situation. According to the majority, the couple "could have filed a legal action seeking to overturn, on constitutional grounds, Illinois's ban on same-sex marriage, just as the plaintiffs in *Obergefell* did" or they could have modeled their claims on *Windsor* and challenged the state's refusal to recognize their out-of-state marriage.[256] Because "Blumenthal and Brewer chose none of these options," the majority rejected Brewer's claims that her state and federal due process and equal protection rights were violated.[257]

Blumenthal makes clear *Obergefell*'s threat to nonmarital relationship recognition. First, *Obergefell* furnishes a constitutional rationale for states to prioritize and privilege marriage above nonmarital relationships. Under *Obergefell*'s logic, the state must make marriage available to same-sex couples

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251. *Id.*

252. *Id.*

253. For a discussion of this surprising development, see Andrew Maloney, *Language Struck Day After Opinion*, CHI. DAILY L. BULL. (Aug. 19, 2016, 2:46 PM), http://www.chicagolawbulletin.com/Articles/2016/08/19/Same-sex-language-struck-8-19-16.aspx.

254. Blumenthal v. Brewer, No. 118781, slip op. at 29 (Ill. Aug. 18, 2016).

255. *Id.*

256. *Id.*

257. *Id.*

because marriage is deeply rooted in our history, conveys unparalleled dignity to individuals and their relationships, and provides a range of material benefits to couples and families. But importantly, the state is under no obligation to treat nonmarital relationships in a similar fashion. Indeed, if marriage is the most profound and meaningful relationship available to adults, the state has a legitimate basis for promoting marriage and its many benefits over nonmarital alternatives.

Second, the marriage equality movement's success in *Obergefell* (and *Windsor*) furnishes a normative imperative in favor of marriage—one that stands as a challenge to those who have pursued other paths. In *Blumenthal*, the fact that the couple *could* have married in Massachusetts casts doubt on their decision to remain unmarried. Relatedly, the fact that the couple could have married and subsequently sued for legal recognition of their union, as other same-sex couples had done, called into question Brewer's decision to raise a joint property claim as an unmarried cohabitant. In this regard, the *Blumenthal* court's message was clear: Not only is the state under no obligation to recognize and respect nonmarriage on par with marriage, when the option is available—and now it is widely available—individuals *should* pursue marriage over nonmarriage.

In the face of such challenges, we might appeal to law as a means of maintaining alternative statuses and furthering the project of relationship-recognition pluralism. In states where domestic partnerships and civil unions exist, straight couples might sue to gain access to these statuses—just as same-sex couples sued to obtain access to civil marriage. In states like Connecticut and Vermont, where such statuses have been eliminated, litigants might sue to have them reinstated—and made available to same-sex and opposite-sex couples alike. And in states like Illinois, where, after *Blumenthal*'s endorsement of *Hewitt*, the status of nonmarital cohabitation remains precarious, citizens might press for judicial repeal of the legal impediments associated with nonmarriage.

Critically, the jurisprudence of nonmarriage might provide a foundation for framing such claims. Specifically, advocates and litigants could rely on the nonmarital parentage cases to argue that legal recognition of alternative statuses might avoid some of the legal impediments of illegitimacy that nonmarital children and their families face in their daily lives. Additionally, advocates might deploy *Lawrence*, *Eisenstadt*, and the nontraditional families cases to support a vision of alternative statuses as a manifestation of privacy, individual autonomy, and familial self-definition.

But such efforts are likely to be unavailing—especially after *Obergefell*. *Obergefell*'s language and logic make clear that marriage is the normative ideal for intimate life. More importantly, the decision's veneration of marriage might be interpreted as signaling that robust constitutional protections for nonmarriage are unavailable if marriage is widely available. On this account,

the state's obligations to individual rights holders are limited to two mandates: it must provide equal access to marriage, and it may not criminalize the decision to live outside of marriage. But, critically, the state is under no obligation to furnish alternatives to marriage or to otherwise recognize and respect nonmarital life beyond ensuring that innocent children are not punished unduly for their parents' nonmarital status.

B. Selective Benefits and Rights

The withering of alternative statuses is not the only likely fallout from *Obergefell*. The decision also signals a more uncertain path forward for legal recognition of specific rights for nonmarital relationships. In the early effort to secure protections for same-sex couples, the LGBT civil rights movement did not restrict its ambitions to pioneering alternative statuses, like domestic partnerships. It also focused on remedying marital status discrimination in the conferral of specific public benefits and rights.

Not all of these efforts were successful, but in time, some of them did result in the conferral of specific rights and benefits to unmarried, same-sex couples. For example, in *Braschi v. Stahl Associates Company*,[258] the New York Court of Appeals concluded that Miguel Braschi and Leslie Blanchard—two gay men—could be considered "family members" under New York City's rent control ordinance.[259] Critically, in filing suit, Miguel Braschi did not seek formal recognition of his relationship with Blanchard; he wanted only the right to remain in their rent-controlled apartment after Blanchard's death—a privilege that spouses and blood relatives enjoyed, but one that was unavailable to unmarried partners.[260] And in stating that it was reasonable to conclude that Braschi and Blanchard were "family members" under the rent control regime,[261] the New York Court of Appeals did not confer on Braschi the full panoply of benefits and rights enjoyed by those family members related by affinity or consanguinity. Instead, the court recognized only Braschi's right to a *specific* benefit—the right to remain in the rent-controlled apartment.[262]

Likewise, in *In re Guardianship of Kowalski*,[263] Karen Thompson petitioned for guardianship of her lesbian partner, Sharon Kowalski, who had suffered severe brain injuries in an automobile accident.[264] Despite the couple's long-term relationship, a lower court refused Thompson's petition, assigning guardianship to a friend of Kowalski's parents.[265] On appeal, the intermediate appellate court reversed, finding that "Thompson's suitability for guardianship

258. 543 N.E.2d 49 (N.Y. 1989).
259. *Id.* at 53–55.
260. *Id.* at 51.
261. *Id.* at 54–55.
262. *Id.* at 59.
263. 478 N.W.2d 790 (Minn. Ct. App. 1991).
264. *Id.* at 791.
265. *Id.* at 792.

was overwhelmingly clear."[266] As in *Braschi*, Thompson was not seeking formal recognition of her relationship with Kowalski. Instead, she sought a specific benefit that was readily available to spouses and other family members, but was often unavailable to unmarried partners.

Braschi and *Kowalski* suggest another means of recognizing nonmarital relationships and nonmarital rights that once was pursued, but now may be foreclosed after *Obergefell*. To be sure, the litigants' claims in both cases were limited by the contemporary legal imagination. At the time of their suits, the prospect of legal recognition of same-sex couples through marriage was unimaginable, if it was considered at all. Accordingly, the litigants' interest in targeting specific rights was born of necessity and informed by the limitations of law. Nevertheless, this kind of piecemeal recognition had real consequences that benefited these couples and their relationships, as well as others similarly situated in nonmarital relationships.

Thus, while *Braschi* and *Kowalski* are often understood as tentative steps toward access to marriage for same-sex couples, they also make clear that marriage need not be the only means by which we can ensure basic protections and benefits for relationships and families. Instead of relying solely on marriage as a conduit to benefits, we might specifically target the marital status discrimination seen in cases like *Braschi* and *Kowalski* with challenges aimed at securing specific rights and benefits that are available only to spouses or those in traditional family arrangements.

A recent case, *Donaldson v. State*,[267] is instructive on this point. There, same-sex couples filed suit against the state of Montana, claiming that they were unable to obtain protections and benefits that were available to similarly situated different-sex couples who were married under state law.[268] Although the *Donaldson* plaintiffs did not seek access to marriage,[269] they did seek the creation of a "statutory structure" that, like marriage, would afford these protections *en tout* to same-sex couples.[270]

Ultimately, the Montana Supreme Court did not reach the merits of the case, concluding instead that the "requested relief exceed[ed] the bounds of a

266. *Id.* at 797.

267. 292 P.3d 364 (Mont. 2012).

268. *Id.* at 365.

269. *Id.* ("Plaintiffs expressly do not challenge Montana law's restriction of marriage to heterosexual couples, do not seek the opportunity to marry, and do not seek the designation of marriage for their relationships."). Critically, in 2004, Montana voters enacted a ballot initiative that amended the state constitution to prohibit legal recognition of same-sex marriages. *See 2004 Election Ballot Measures*, CNN.COM, http://www.cnn.com/ELECTION/2004/pages/results/ballot.measures [https://perma.cc/6HYK-8LUV] (last visited Mar. 1, 2016). Plaintiffs did not challenge the constitutional ban or their exclusion from civil marriage. *Donaldson*, 292 P.3d at 365.

270. *See* Complaint for Injunctive and Declaratory Relief at 2, Donaldson v. State, 292 P.3d 364 (Mont. 2012), https://www.aclu.org/legal-document/donaldson-and-guggenheim-v-montana-complaint [https://perma.cc/Q5BH-MYMB].

justiciable controversy."[271] Any decision to create a "statutory structure"[272] would have to come from the legislature, not the courts.[273] But, interestingly, the court made clear that the plaintiffs had other options for securing the protections they sought. The court encouraged the plaintiffs to "amend the[ir] complaint and to refine and specify the general constitutional challenges they ha[d] proffered."[274] That is, the court encouraged the plaintiffs to pursue specific benefits claims, of the sort advanced in *Braschi* and *Kowalski*, rather than focusing on securing the creation of a state-recognized status. Indeed, the *Donaldson* court expressed concern that by framing their desired remedy as the creation of a "statutory scheme" for relationship recognition, the plaintiffs actually "precluded the development of claims that specific statutes promote or cause discrimination."[275]

Similar concerns surfaced in *Obergefell*. Although the bulk of Chief Justice Roberts's dissent focused on his objections to the expansion of same-sex marriage by judicial fiat, he also suggested that "[t]he equal protection analysis might be different . . . if we were confronted with *a more focused challenge to the denial of certain tangible benefits*."[276] Thus, even as he objected to the expansion of civil marriage as judicial overreaching,[277] Chief Justice Roberts intimated that withholding certain rights and benefits on the basis of marital status *would* constitute discrimination in violation of the Equal Protection Clause.

In Chief Justice Roberts's view, the majority's decision to expand marriage had negative consequences for these other targeted rights claims. As Chief Justice Roberts lamented, these "more selective claims [to particular benefits] will not arise now that the Court has taken the drastic step of requiring every State to license and recognize marriages between same-sex couples."[278] By focusing on marriage, rather than on the withholding of specific "ancillary legal benefits that accompany marriage, such as hospital visitation rights and recognition of spousal status on official documents,"[279] the petitioners and the majority made marriage both the issue and the only available remedy.

To be sure, the prospect of piecemeal benefits was likely unappealing to the many same-sex couples who desired ready access to marriage and the panoply of benefits with which it is associated. This kind of targeted-benefits

271. *Donaldson*, 292 P.3d at 366.
272. *Id.* at 365.
273. *See id.* at 366.
274. *Id.* at 367.
275. *Id.*
276. Obergefell v. Hodges, 135 S. Ct. 2584, 2623 (2015) (Roberts, C.J., dissenting) (emphasis added).
277. *Id.* at 2611 ("[T]his Court is not a legislature. Whether same-sex marriage is a good idea should be of no concern to us. Under the Constitution, judges have power to say what the law is, not what it should be.").
278. *Id.* at 2623–24.
279. *Id.* at 2623.

recognition, however, might have been welcomed by those who, for whatever reason, remained uninterested in marriage but wished to have access to basic benefits and privileges. More importantly, such claims—and their successful resolution—would underscore a broader commitment to nonmarital equality going forward. In this regard, by focusing on marriage as both the issue and the remedy, *Obergefell* obscures—and perhaps precludes—claims that focus on remedying marital-status discrimination.

*C. Nonmarital Parenting Post-*Obergefell

In a recent article, Professor Douglas NeJaime considers *Obergefell*'s effects on parenthood in and outside of marriage.[280] Although NeJaime concedes that "access to marriage may limit other paths to parental recognition and may reduce incentives to achieve laws that recognize unmarried, nonbiological parents," he maintains that "marriage equality has the capacity to contribute to more pluralistic family law and to accelerate the slippage between marital and nonmarital parentage."[281] Specifically, he argues that, "[b]y affirming the equal worth of same-sex couples' family formation and by mainstreaming same-sex parenting, marriage equality can function as an important precedent for the growth of intentional and functional parenthood for all families, not only inside but also outside marriage."[282]

NeJaime is surely correct that "there is *potential* for [marriage equality] to yield more robust recognition for *some* unmarried parents."[283] But the post-*Obergefell* landscape may be less rosy than NeJaime suggests. It is worth noting that one of the petitioner couples in the *Obergefell* suit was a lesbian couple who were coparenting foster children.[284] Critically, when they filed their lawsuit against the state of Michigan, Jayne Rowse and April DeBoer were not challenging their exclusion from civil marriage.[285] They were challenging Michigan's adoption laws, which prevented unmarried persons from jointly adopting.[286]

In presenting their claim, Rowse and DeBoer drew upon the jurisprudence of nonmarriage. Michigan's policy, they argued, was effectively a species of marital-status discrimination.[287] They could not adopt because they could not

280. Douglas NeJaime, *Marriage Equality and the New Parenthood*, 129 HARV. L. REV. 1185, 1250 (2016).

281. *Id.* at 1252–53.

282. *Id.* at 1250.

283. *Id.* at 1253 (emphasis added).

284. *Obergefell*, 135 S. Ct. at 2595.

285. Julie Bosman, *One Couple's Unanticipated Journey to Center of Landmark Gay Rights Case*, N.Y. TIMES, Jan. 25, 2015, at A14 ("April and Jayne, as much as they wanted to get married and adopt their kids, never set out to challenge the marriage ban.").

286. *Id.*

287. Complaint for Declaratory and Injunctive Relief ¶ 20, DeBoer v. Snyder, 973 F. Supp. 2d 757 (E.D. Mich. 2014) (No. 12-CV-10285), 2012 WL 8719652.

marry.[288] Citing *Levy v. Louisiana* and *Weber*, among others, Rowse and DeBoer argued that Michigan's policy contravened established constitutional precedents that prohibited discrimination against children based upon their parents' unmarried status.[289] With the jurisprudence of nonmarriage as their guide, Rowse and DeBoer forcefully asserted that Michigan's adoption policy was "irrational on its face."[290]

As Rowse and DeBoer's lawsuit progressed through the courts, however, their lawyers were advised to reframe the underlying legal claim.[291] Instead of challenging the adoption policy and seeking its modification to permit joint adoptions by unmarried couples, Rowse and DeBoer were encouraged to challenge the state's marriage laws.[292] If Michigan recognized their marriage, there would be no impediment to a joint adoption. With this in mind, the couple filed an amended complaint, focusing their claims on the consequences of their exclusion from civil marriage.[293]

After *Obergefell*, Rowse and DeBoer were able to marry, and thus became eligible to jointly adopt. Still, one cannot help but be wistful for their initial claim rooted in the jurisprudence of nonmarriage, and its possibilities for those whose family structures do not conform to the traditional marital model.

With this in mind, how would a claim like the one Rowse and DeBoer initially filed fare in a post-*Obergefell* world? Critically, the legal impediments to joint adoption that Rowse and DeBoer faced remain in place. In a number of jurisdictions, unmarried couples, whether gay or straight, are not permitted to jointly adopt.[294] Prior to *Obergefell*, some states, by judicial fiat, facilitated

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288. *Id.* ¶ 18.

289. Plaintiffs' Responsive Brief in Opposition to Defendants Motion to Dismiss, *DeBoer*, 973 F. Supp. 2d 757 (No. 12-CV-10285), 2012 WL 9494116, at *5 ("The Defendants' actions in this case single out and deny legal benefits to a subset of children: those who are parented by unmarried couples. The Supreme Court frequently has held that disparate treatment of the children of unmarried parents based on the conduct or status of their parents violates the Equal Protection Clause.").

290. *Id.* at *6.

291. *See* DeBoer v. Snyder, 772 F.3d 388, 397 (6th Cir. 2014) ("Rather than dismissing the action, the court 'invit[ed the] plaintiffs to seek leave to amend their complaint to . . . challenge' Michigan's laws denying them a marriage license."); *see also* Bosman, *supra* note 285 (noting that the trial judge encouraged Rowse and DeBoer to "[a]mend [their] claim to take on Michigan's law banning same-sex marriage").

292. Bosman, *supra* note 285.

293. Amended Complaint for Declaratory and Injunctive Relief, *DeBoer*, 973 F. Supp. 2d 757 (No. 12-10285), 2012 WL 12285212.

294. Twenty-four states specifically restrict joint adoption to married couples. *See* ALA. CODE § 26-10A-5 (2016); ALASKA STAT. ANN. § 25.23.020 (2016); ARIZ. REV. STAT. ANN. § 8-103 (2016); ARK. CODE. ANN. § 9-9-204 (2016); DEL. CODE ANN. tit. 13, §§ 903, 951 (2016); FLA. STAT. ANN. § 63.042 (2016); HAW. REV. STAT. § 578-1 (2016); IND. CODE. ANN. § 31-19-2-4 (2016); IOWA CODE ANN. § 600.4 (2016); KAN. STAT. ANN. § 59-2113 (2016); KY. REV. STAT. ANN. § 199.470 (2016); ME. REV. STAT. 18-A, § 9-301 (2015); MASS. GEN. LAWS ANN. CH. 210 § 1 (2016); MICH. COMP. LAWS ANN. § 710.24 (2016); MONT. CODE ANN. § 42-1-106 (2015); NEV. REV. STAT. ANN. § 43-101 (2016); N.H. REV. STAT. ANN. § 170-B:4 (2016); N.D. CENT. CODE ANN. § 14-15-03 (2015); OHIO REV. CODE ANN. § 3107.03 (2015–16); OKLA. STAT. ANN. TIT. 10, § 7503-1.1 (2016); R.I. GEN. LAWS

family formation by same-sex partners under the auspices of "second-parent adoption."[295] In the manner of a stepparent adoption, second-parent adoption permits a legal parent and a partner to jointly adopt a child. But, critically, second-parent adoption emerged as a means of circumventing the fact that same-sex couples were excluded from marriage, and thus, could neither adopt jointly nor access stepparent adoption as a vehicle for formalizing the parent-child relationship.[296] Accordingly, second-parent adoption served as an equitable remedy for the law's denial of marriage equality.

After *Obergefell*, married couples, whether gay or straight, will be permitted to adopt jointly. But it remains unclear whether second-parent adoption will continue to be available to unmarried same-sex couples as a means of formalizing the legal relationship between the second parent and the child. Indeed, *Obergefell*'s association of marriage with the child's best interests suggests that states need not provide same-sex couples with other methods for formalizing the parent-child relationship if marriage is available to all couples. After all, if marriage "affords the permanency and stability important to children's best interests,"[297] why would law sanction and facilitate other methods of family formation, particularly those that credit nonmarriage? Such concerns might be especially pressing in the context of adoption, which courts have characterized as a state-conferred privilege that may be subject to stringent statutory requirements.[298]

Adoption is not the only coparenting situation in which *Obergefell* may have an impact. Consider gestational surrogacy. Although it has gone largely unregulated, increasingly states have begun to enact statutes that aim to regulate the process of gestational surrogacy. Of those jurisdictions that do regulate gestational surrogacy, four specifically limit gestational surrogacy to married couples.[299] Although *Obergefell* broadens the constituency that may

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ANN. § 15-7-4 (2016); VA. CODE ANN. § 63.2-1201 (2016); W. VA. CODE § 48-22-201 (2016); WIS. STAT. ANN. § 48.82 (2016).

Other states employ gender-neutral language in their statutes, but nonetheless restrict adoption to married couples. In Arizona a married couple must be given preference for placement of a child over a single person when all other considerations are determined equal.

295. *See generally* Jane S. Schacter, *Constructing Families in a Democracy: Courts, Legislatures and Second-Parent Adoption*, 75 CHI.-KENT L. REV. 933 (2000) (discussing the deployment of second-parent adoption as a conduit to LGBT family formation).

296. Polikoff, *supra* note 208; Elizabeth Zuckerman, *Second-parent Adoption for Lesbian-Parented Families: Legal Recognition of the Other Mother*, 19 U.C. DAVIS L. REV. 729, 731 (1986) (noting that in light of the unavailability of same-sex marriage, second-parent adoptions are a way to "provide the child with two legal parents").

297. Obergefell v. Hodges, 135 S. Ct. 2584, 2600 (2015).

298. *See, e.g.*, Lofton v. Sec'y of Dep't. of Children and Family Servs., 358 F.3d 804, 809 (11th Cir. 2004) (noting that "adoption is not a right; it is a statutory privilege. Unlike biological parentage, which precedes and transcends formal recognition by the state, adoption is wholly a creature of the state") (internal citations and quotation marks omitted).

299. *See, e.g.*, FLA. STAT. ANN. § 742.15(1) (2016); TEX. FAM. CODE ANN. § 160.754(B) (2015); UTAH CODE ANN. § 78B-15-801(3) (2016); VA. CODE ANN. § 20-156 (2016).

avail themselves of gestational surrogacy in these four jurisdictions, unmarried couples—whether gay or straight—are prohibited from doing so. *Obergefell* furnishes little basis for challenging this nonmarital inequality. Indeed, its invocation of marriage as conducive to the child's best interests would seem to credit a state's decision to structure their surrogacy laws in this manner.

Following *Obergefell*, nonbiological, nonmarital routes to parenthood, like de facto parenthood, may also be imperiled. Prior to the introduction of marriage equality in the United States, a minority of jurisdictions developed a de facto parenthood doctrine intended to recognize those who were not genetically or biologically related to the child, but who had nevertheless functioned in the manner of a parent. In doing so, some courts placed special emphasis on the fact that for same-sex couples in this situation, marriage was unavailable as a means of formalizing the parent-child relationship.

In *Obergefell*'s wake, the availability of marriage may factor into the consideration of claims of de facto parenthood, just as it factored into the Illinois Supreme Court's disposition of *Blumenthal*.[300] The facts and disposition of *Conover v. Conover*,[301] illustrate these concerns. There, a Michelle and Brittany Conover conceived a child via artificial insemination prior to their marriage.[302] At issue in their divorce was whether Michelle, who was not biologically related to the child, and had not formally adopted the child, was a parent for purposes of child custody and visitation.[303] Michelle argued that she should be considered a parent under the de facto parent doctrine.[304] In reviewing the case on appeal, a Maryland court noted that at the time of the child's conception and the birth, same-sex marriage was unavailable in the District of Columbia, where the couple lived.[305] Nevertheless, same-sex marriage *was* available in three other U.S. jurisdictions—Connecticut, Massachusetts, and Iowa.[306] In a move that presaged the Illinois Supreme Court's decision in *Blumenthal*,[307] the reviewing court focused on the availability of same-sex marriage in these other jurisdictions. Because "the couple could have married before [the child] was born, but did not,"[308] the Illinois Supreme Court found no error in the trial court's conclusion that the de facto parent doctrine was unavailable as a route to legal parenthood. Like *Blumenthal*, *Conover* makes clear the dangers that exist for unmarried parents in *Obergefell*'s wake. Courts may be less willing to credit alternative routes to

300. *See* Blumenthal v. Brewer, No. 118781, 2016 WL 4395043 (Ill. Aug. 18, 2016).
301. 120 A.3d 874 (Md. Ct. Spec. App. 2015).
302. *Id.* at 876.
303. *Id.*
304. *Id.* at 877–78.
305. *Id.* at 883.
306. *Id.*
307. *See* Blumenthal v. Brewer, No. 118781, 2016 WL 4395043 (Ill. Aug. 18, 2016).
308. *Conover*, 120 A.3d at 883.

parenthood in circumstances where marriage is available but the couple has declined to take advantage of this path to parenthood.[309]

Critically, in all of these situations, the jurisprudence of nonmarriage would likely be unavailing as a source of protection for unmarried persons and their family relationships. The illegitimacy cases, and their interest in limiting discrimination against nonmarital children, would have little purchase. If the state, relying on *Obergefell*, insisted that marriage serves "children's best interests,"[310] then a policy that limits adoption to married couples—in a country where marriage is broadly accessible—seems well-suited to the state's interest in vindicating the best interests of the child. And even if a court recognized that the unmarried "can create loving, supportive families,"[311] *Obergefell* makes clear that these families pale in comparison to the marital family—making it wholly rational for the state to credit marriage over nonmarriage in these situations.

Accordingly, *Obergefell* will likely have a profound effect on methods of family formation that deviate from the marital norm. This is at once ironic and problematic. It is ironic because in the early days of the LGBT rights movement, there was a strong impulse to develop alternative family forms and structures and methods of family formation that did not depend on marriage. In the 1980s, for example, "lesbians and gay men . . . began to speak widely of chosen families, the families they saw themselves creating as adults."[312] The emphasis on these chosen families was a response to the fact that LGBT individuals were "ideologically excluded" from the traditional understanding of family, which was "by definition, heterosexual."[313] Marginalized and disfavored, LGBT individuals turned toward the project of "queering" the family—creating and crediting meaningful alternatives to the traditional marital family from which they were legally excluded.

In the ensuing years, some worried that the emphasis on marriage equality would drown out "demands for the larger goals that have typically characterized LGBT organizing—recognition and acceptance of difference, an embrace of constructed communities, and demands for universal human rights and economic justice."[314] *Obergefell* does little to mute these concerns. Indeed,

309. *See, e.g.*, In re Madrone, 350 P.3d 495, 496 (Or. Ct. App. 2015) ("[W]e conclude that ORS 109.243 applies to unmarried same-sex couples who have a child through artificial insemination if the partner of the biological parent consented to the insemination *and the couple would have chosen to marry had that choice been available to them*.") (emphasis added).

310. Obergefell v. Hodges, 135 S. Ct. 2584, 2600 (2015).

311. *Id.*

312. Kath Weston, *Families in Queer States: The Rule of Law and the Politics of Recognition*, 93 RADICAL HIST. REV. 122, 130 (2005); *see also* Kaaryn Gustafson, *Breaking Vows: Marriage Promotion, the New Patriarchy, and the Retreat from Egalitarianism*, 5 STAN. J. C.R. & C.L. 269, 300 (2009) ("LGBT families have commonly constructed families that transgress and transform notions of family.").

313. Weston, *supra* note 312, at 130.

314. Gustafson, *supra* note 312, at 301.

it amplifies them. The decision credits and entrenches the view that the traditional marital family is the ideal form for family life and child-rearing. In so doing, it renders nonmarital families less valuable and less worthy, further marginalizing and stigmatizing nonmarital life and frustrating the effort to recognize and respect a wider range of family and kinship forms.

* * * *

As we take stock of the challenges that nonmarriage and nonmarital families will likely face in the post-*Obergefell* era, it is easy to collapse into pessimism. In the face of such pessimism, it is important to remember that marriage's primacy is neither natural nor inevitable. As this account has made clear, the road to *Obergefell* was not straightforward or obvious. At various points, different paths were available and different agendas might have been pursued. Indeed, despite its shortcomings and ambivalence, the very fact that the jurisprudence of nonmarriage offered some limited protections to nonmarital families suggests recognition of these alternative paths and agendas, and a desire to make such recognition a matter of constitutional law.

CONCLUSION

Although few have critiqued *Obergefell*'s pro-marriage rhetoric and reasoning, the *Obergefell* majority's implied disdain for life outside of marriage did not go completely unnoticed. In a footnote in his dissent, Justice Thomas chided the majority for its assertion that "marriage confers 'nobility' on individuals."[315] Such an assertion was, to Justice Thomas, puzzling.[316] After all, "[p]eople may choose to marry or not to marry. The decision to do so does not make one person more 'noble' than another. And the suggestion that Americans who choose not to marry are inferior to those who decide to enter such relationships is specious."[317]

Although Justice Thomas's dissent may rankle on other fronts,[318] this statement about the tenor of the majority's decision, and its implications for those outside of marriage, strikes a chord. If *Obergefell* stands for the proposition that "love wins," who loses? Unfortunately, as this Essay explains,

315. Obergefell v. Hodges, 135 S. Ct. 2584, 2639 n.8 (2015) (Thomas, J., dissenting) (internal citation omitted).

316. *Id.* ("I am unsure what that means.").

317. *Id.*

318. Many have criticized Justice Thomas's claim that "human dignity cannot be taken away by the government. Slaves did not lose their dignity (any more than they lost their humanity) because the government allowed them to be enslaved. Those held in internment camps did not lose their dignity because the government confined them." *See* Lynette Holloway, *Clarence Thomas Under Fire for Invoking Slavery in Dissent to Ruling on Gay Marriage*, ROOT (June 27, 2015), http://www.theroot.com/articles/news/2015/06/clarence_thomas_under_fire_for_invoking_slavery_in_his_same_sex_marriage [http://perma.cc/966Z-6E28].

a victory for marriage equality comes at the expense of the unmarried and nonmarriage. Even as *Obergefell* insists on equal access to marriage for same-sex couples, it implicitly underwrites the inequality of nonmarriage and nonmarital families. And more troubling, the decision, with its florid pro-marriage rhetoric, has strong potential to embed this inequality into the structure of constitutional law, reneging on the promise of constitutional protection for nonmarital life that was threaded through the jurisprudence of nonmarriage.

As we reflect on *Obergefell* and marshal its rhetoric for other causes and claims, we should keep these underappreciated aspects of the decision in mind. Although *Obergefell* has done much to advance and enlarge the right to marry, this right is not the only one worth preserving and protecting. Indeed, in *Loving v. Virginia*, one of its earliest discussions of the fundamental right to marry, the Court explicitly spoke of "the freedom to marry *or not marry*."[319] *Obergefell* extends the freedom to marry in the name of equality. Going forward, the challenge is to ensure that *Obergefell*'s logic and rhetoric do not mute or dismantle constitutional protections for this corollary right not to marry.

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319. 388 U.S. 1, 12 (1967) (emphasis added).